
MEMORANDA LEGALIA,
OR AN
ALPHABETICAL DIGEST
OF THE
Laws of England.

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ALPHABETICAL DIGEST

OF THE

LAW OF ENGLAND.

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Memoranda Legalia:

OR AN

ALPHABETICAL DIGEST

OF THE

LAWS OF ENGLAND:

ADAPTED TO THE USE OF

THE LAWYER, THE MERCHANT, AND THE
TRADER.

By GEORGE CLARK,

Attorney-at-Law.

LONDON:

Printed by H. L. GALABIN, No. 1, Ingram-Court, Fenchurch-Street:

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1800.

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Specimens of the

ALPHABETICAL DIGEST

LAW OF ENGLAND



By GEORGE CLARK

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1800

P R E F A C E.

IT was wisely observed by the immortal Bacon, "that every man ought to know as much of law as will enable him to keep himself out of it." It is not, indeed, expected that every man should be a lawyer. It is impossible it should be so. The study of the law is difficult, on account not only of the great variety of subjects it embraces, confusedly dispersed through ten times as many volumes, but of the abstruse mode of expression and frequent use of technical terms by writers on this subject. To do away, in some measure, these inconveniences, the points treated of in the following sheets are disposed in such a way that immediate application may be made to the subject, and the use of technical terms is greatly avoided.

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Memoranda Regalia:

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LAW OF ENGLAND:



BY GEORGE CLARK

LONDON:

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the mischief produced by works of this nature, setting aside the imposition practised upon the purchasers of them; for, the public have not only been disappointed when they have sought after information, but, in the instances where much has been said on the subjects of their inquiry, they have had the mortification to find themselves involved in error, or puzzled by nonsense and contradiction.

If the works alluded to had even small claims upon the public for their approbation, they would not have been treated with so much severity in this place; but, as the language here used is used for the purpose of caution rather than of depreciation, a great degree of tenderness in animadverting upon them would be unnecessary.

The intent of the present volume is to throw light upon all such legal subjects as come within the view of the merchant, the trader, and the moneyed man; and that in such a way as to enable the inquirer to obtain the information he wants with the greatest facility. How far the work is calculated to promote these objects, a discerning and candid public will decide; and the editor rests completely satisfied that its reward will be commensurate with its merits.

But this publication is also designed for the use of the profession, to whom the editor hopes and persuades himself it will prove an invaluable collection of practical legal minutes upon points of most general use. He flatters himself that, in this view, it will have strong claims upon their patronage.

The

The materials of which it is composed, their condensed but conspicuous form and regular arrangement, are such, as will seldom on any doubtful point leave the trouble of a search unrewarded. A vast variety of articles are introduced into this volume, comprehending most of the subjects with which the common law of the land is conversant.

It is possible and not improbable that some fastidious readers will exclaim against this praise of the performance, as unbecoming and presumptuous; but these may be answered by referring them to the work itself, which will either justify or condemn it; and hold up the author and his work to public approbation, or expose them to as public censure. His view in it is to insure that attention to his work which he conceives it deserves, and because he is impressed with an opinion that it will be singularly useful.

When the editor recommends his publication to gentlemen of the profession with so much ardour, he would not be understood to impute to them *in general* a want of professional knowledge, he only intends to observe, that the memory frequently wants help in the best informed and most retentive minds. Nor would he be understood to mean, on the other hand, that there are not many, and very many too, in the profession, in whom ignorance is the most prominent trait; and that from one of two causes, *i. e.* a want of *capacity*, or a want of *application*; and, in some instances, from both of them. And he ventures this

remark from a conviction, that, in so doing, he incurs no danger of giving offence to any one, inasmuch as no one will be found honest enough to apply the observation to himself.* Nor in saying this does he intend to lessen the respect due to the men of law. It is well known that the profession abounds with men of honour and integrity, although it is polluted with characters of a contrary description. The author will not, however, presume to decide (in this instance) the question of preponderance; yet, as he writes for the benefit not merely of lawyers but of the public, he calls upon that public to mark and discriminate; and, in their choice of an attorney, to recollect, that there are amongst them men of two descriptions; some, whose great object it is to obtain for their employers the most ample justice; and others, whose whole concern is to effect the greatest possible advantage to themselves.

That the law is not as honourable in its practice as in its profession is greatly owing to the number of its professors. The time has been when the number received great addition by an ingress of persons destitute of friends, connexions, and education; and who were of course thrown upon the world, with no other prospect than to cozen or starve; and these formed an immense assemblage of voracious (because they

* Si quisquam offendatur et sibi vindicet, non habet quod expostulat cum eo qui scripsit; ipse si volet secum agat injuriam, utpote sui proditor, qui declaravit hoc ad se propriè pertinere. —
BRASSMUS.

were hungry and breadless) members. But this evil has been happily in great measure averted by the interposition of the legislature, which has imposed a stamp-duty of £100 upon articles of clerkship; a plan which the editor of the following sheets warmly approves, and to which he had never any objection except as far as it attaches to the case of a *father* and *his son*. But perhaps this circumstance may have had an undue weight upon the mind of a man feeling the pressure of a very numerous family. He does not mean to call in question either the wisdom or benevolence of parliament. This part of the plan was no doubt deemed necessary, in order to purge the law of the blood and race of some of its members. The present most amiable LORD CHIEF-JUSTICE of the COURT of KING'S BENCH is unremitting in his exertions to cleanse the *Augean* stable.

The editor is not, however, without some fears, that the prospect of good, which has been viewed through the medium of this regulation, may be obscured by an increase instead of a diminution of the number of attorneys. The general opinion of the advantages to be derived from it, in making the profession more respectable and more profitable by an increase of its importance and a decrease of its members, has induced every tradesman, who can spare a hundred pounds, to make his son an attorney, and of course a gentleman. This rage has been and is very great; and will, it is feared, in a few years effectually prevent the hopes of our legislators from being realized: for, it may be laid down as an infallible rule,

rule, that, in proportion as the practisers of the law are overcharged in number, the practice will be overcharged with chicanery and litigation. The editor has known an instance, in a considerable town less than twenty miles from the metropolis, which for many years scarcely would maintain one attorney, because there was but one, and which does now, and has for several years, maintained three in comparative splendour. It is, however, but justice to observe, that it cannot be said of them that they are all alike destitute of the love of peace and moderation, they are not all *in pari delicto*.

The number of attorneys in former ages was much less than at present, and the consequence of there being too many at that time well known and fairly appreciated. A statute, passed in the 33d year of Henry the Sixth, states, that "not long before that time there had not been more than six or eight attorneys in Norfolk and Suffolk, in which time great tranquillity reigned; but that the number had increased to twenty-four, to the great vexation and prejudice of these counties:" it therefore enacts, that, for the future, there shall only be six attorneys in Norfolk, six in Suffolk, and two in the city of Norwich." It cannot, however, be expected that they should, at this time of day, be so thinly distributed. An extension of commerce and a more general diffusion of riches, rather than an increased love of litigation, have made a greater number necessary at this time than in former ages; and the people, if they will do justice to themselves, may

may find sure protection at all times under the guardian wings of our venerable judges, who, highly to their honour, have united to an ardent desire their most active endeavours to check and punish all legal depredators.

Let us now look for a moment on the other side of the question. — The practice of the law is honourable, and there is in it, fortunately for the world, a number of completely-honourable characters! Nothing is more perfectly ridiculous than the idea, nourished by some persons, that, because a man is an attorney, he must therefore necessarily be a villain. Reflections of this nature are too contemptible to deserve serious notice; they shall therefore be passed over by merely observing, that, wherever they prevail, they are the offspring of prejudice, fostered by inveterate ignorance; and it may be boldly asserted, that there are to be found men in that profession, whose characters stand high in the scale of honour, and whose minds are untainted with that sordid love of gain, which swallows up all other considerations, and which, in all cases, sees but one interest,—*the interest of AVARICIOUS SELF!*

As a PHILANTHROPIST, the editor ardently hopes that the number may be increased. It is in the power of men practising the law to do much evil; it is in their power to do much good: as they are strong, they should be merciful. In proportion as they have opportunities of betraying men into DANGER, their endeavours should be exercised to prevent it. A VIRTUOUS CHARACTER, before he
suffers

suffers his friend to be tossed upon the tumultuous sea of litigation, will calculate upon the mischiefs that may be produced. He will represent, to men driven along by the sudden gusts of PASSION, or the more temperate, but no less dangerous, gales of REVENGE, the hazards they may encounter, the anxious days and restless nights they are creating for themselves, as well as for the objects of their rage. It is the province of an honest attorney to moderate the fury and calm the indignation which sometimes present themselves, and, if possible, to conduct his employers into the serene and blissful harbours of PEACE. He will at all times prefer a temperate arbitration to a turbulent law-suit.

I know this sort of language will not suit the genius of some men. Men of litigious dispositions detest nothing so much as an attorney who is a mediator. But, "from such men," CANDOR and HONOUR are continually crying, "GOOD LORD, "DELIVER US."

It may be proper to observe, that there are several articles introduced into this volume which do not properly belong to the subject of law; such as *tables for valuing annuities, tables of dividends, of interest, statement of public funds, &c.*; and these were introduced for the purpose of rendering the work the more eminently useful. It is intended that the following sheets should be the constant companions of the office and computing-house; and these articles are introduced, in order that all which could be useful in
such

P R E F A C E.

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such a companion should be contained in this volume.

The reader is particularly requested to consult the *corrections*, and to alter the press in the several instances there pointed out. At the end of the volume is an index to the digest concerning MARINE INSURANCES, that being a copious subject.

G. C.

Old Brentford,

1 Sept. 1800.



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G.C.

Old Burying
18th 1800

CORRECTIONS.

Page 1, line 1, for "legalis," read "legalia."

Page 6, line 18, for "obliger," read "obligor."

Page 11, *dele* "from whom testator once removed."

Page 45, line *ult.* for "has," read "will."

Page 57, as to the operation of the Statute of Frauds in cases of sale by auctions, *see* page 148.

Page 133, as to the *Stat. 14 Geo. III. c. 42*, *see* the article TENDER, a note.

Page 205, under the article FORESTALLING, *see* VICTUALS.

Page 208, line last but one, for "notwithstanding," read "not."

Page 382, the law respecting pawning and pawnbrokers is materially altered by a statute lately passed, 39 and 40 Geo. III. c. 99.

Page 405, line 15, *dele* "or within four miles thereof," and refer to the article VICTUALS.

ADDITIONAL CORRECTIONS.

Page 316, line 23, for "husband or wife," read "any other person."

Page 498, line 17, *add* "payable to other persons."

1890

MEMORANDA LEGALIS,
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ACCIDENTS.

AN action at law will lie for an accidental injury done by one person to another. 1 *Str.* 590. As where a man draws his bow, shoots his arrow, and unintentionally wounds; or, where a person, standing by to see another uncock a gun, is accidentally wounded. *Id.* 598. But, in these cases, damages are given not by way of *punishment* but to *make amends* to the injured party; unless the indiscretion has been highly blameable. But an action will not lie where, by a sudden fright, a horse runs away with his rider and hurts a man; unless perhaps it could be proved that the horse was used to run away with his rider; and, if such accident was occasioned by another person's whipping the horse, such person would be liable to an action. 4 *Mod.* 305.

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But a distinction is made between cases of *accident* and of *necessity* [See NECESSITY]; and, therefore, it has been held, that, to an action of trespass, a defendant may plead that it was not in his power to prevent the injury; as, that his cattle, being in the road near the plaintiff's close, here and there snatched, and against his will depastured, the plaintiff's grass or corn. 2 *Morg.* 263. Or that he chased sheep, mixed with his own, to a place where he might separate them. *Ibid.*

Again:—where the wind blew down a *tree*, the property of I. S. and it fell upon the land of I. N. it was held to be lawful for I. S. to go upon the land of I. N. to fetch it away; but, if the *loppings* of a tree should so fall, the owner cannot in all cases do so; because, the falling of them there might perhaps have been prevented, if due caution had been used; but, if it appears that all due caution was used, and that their falling there was unavoidable, they may be fetched away; as may fruit, which falls on another's land. *Bro. Tresf.* 213. But, in these cases, it would be prudent to make a previous demand.

And cases of *mistake* [See MISTAKES] are again distinguished from those of *accident* and *necessity*; for, if one pays money to another by mistake, thinking there was so much money due, he may recover it back. 1 *Salk.* 22: 1 *T. Rep.* 286.

Relief may sometimes be had against *accidents* and *mistakes* in a court of law: as, where deeds are lost, mistakes made in receipts or accounts, wrong payments made, where death happens, which makes it impossible to perform a condition literally, and a multitude of other contingencies. And many cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. 3 *Black. Com.* 431: 1 *Gill. Evid.* 598.

ACCOUNTS.

When persons have mutual dealings, signing the account is not necessary to make it a *stated* one; but it is keeping it any length of time, without making an objection, which binds the person to whom it is sent, and prevents his entering into an open account afterwards. 2 *Atk.* 251.

Among merchants, it is looked upon as an allowance of an account current, if the merchant who receives it does not object to it in a second or third post. 2 *Vern.* 276, *per Hutchins*, Lord Comm. *Sherman v. Sherman*.

ACQUITTANCES. — See *Receipts*.

In some cases, a court of equity will order accounts to be opened, even after an acquittance in full of all demands.

And now, in the superior courts of law, the producing an acquittance will not bar the action, if the plaintiff can by any means shew a mistake, and that he has not been paid, or paid so much as the acquittance is for. 2 *T. Rep.* 366.

The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the acquittance ought to be given accordingly: — Thus A owed B a certain sum of money on bond, and certain money for goods sold; and, at the day of payment of the bond, he tendereth the money according to the bond, which B accepted, and said it should be for the book-debt and not for the bond-debt. But A said he paid it on his bond, and no otherwise. B crossed his book and brought an action on the bond, but it was adjudged against him; for, A is to appoint the manner of payment. 22 *E. iv.* 25: a

Bro. Condition, pl. 181. But if he, who pays money, does not direct its application to any distinct object of account, the person receiving has that privilege.

A receipt of a particular tenor cannot be insisted upon by one tendering money. *Peake, 179.*

ACTS OF BANKRUPTCY. — See *Bankrupts.*

ACTION AT LAW.

When to be preferred to a commission of bankruptcy, see BANKRUPTS. When service of process, to be preferred to an arrest; see DEBTOR and CREDITOR.

If an act occasions an immediate injury to another, an action of trespass is the proper remedy. But, if the injury be not immediate, but only consequential on the act done, the party injured must bring an action on the case. 8 T. Rep. 119.

ACTS. — See *Contracts, Covenants, Requests.*

In the management of men's business and affairs, it often becomes a material question, who is to do the *first act*. It frequently happens, that, before a person can take legal advantage of the laches or defaults of others, it is necessary some act should be previously done on his part; and, in all cases where that advantage is intended to be taken, it is essential for the party to do all that is incumbent on him in law to do.

Thus A agreed to sell B his estate for a particular sum before a certain day, in consideration whereof, B agreed to pay that sum on the day; and, on failure, to pay £21.
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In this case it was said, A could not recover the £21 without shewing a conveyance on his part, or a tender of one, contrary to the principle of some old cases. 1 *Roll. Abr.* 415, *pl.* 8: 1 *Saund.* 319: and 1 *Str.* 535. They are said to be dependent covenants: when one party conveyed his estate, he was to receive the purchase-money; and, when the other parted with his money, he was to have the estate. They are reciprocal acts to be performed by each other at the same time; and no action will lie by one party, unless he performed or offered to perform *his* covenant. 4 *T. Rep.* 761. So, where the defendant, in consideration that the plaintiff had bought of him a certain quantity of corn at a fixed price, undertook to deliver it to the plaintiff at S, within one month of the time of the sale, the plaintiff, to recover in an action for the corn, must shew that he tendered the price; for, here the delivery of the corn and payment of the money were concurrent acts, to be done at the same time; and each must shew that he hath performed, or made a tender to perform, his part before an action will lie against the other. 7 *T. Rep.* 125.

If one bind himself to give a certain release, it is at his peril to prepare it. *Cro. El.* 716.

Where a man covenants to seal and deliver a deed, he is bound to put it in writing; but, if he refuse, the covenantee may do it. 2 *Roll. Rep.* 177: 1 *Mod.* 104: 8 *T. Rep.* 370.

Where a covenant is to enter into bond, the covenantor is to prepare and tender it. *Sid.* 178.

If one covenant to make such an assurance as the counsel of the covenantee shall advise, and the covenantee informs the covenantor that his counsel has advised after such a manner, the covenantor must make such assurance; but, if it had been barely as counsel should advise, it would be otherwise; for, in such case, the counsel is to draw it, and the covenantee must bring such assurance ready engrossed,

and tender it to the covenantor to seal. *Moor*, 596: *Cra. El.* 298: 2 *Lev.* 25: 1 *Mod.* 104.

Where one binds himself for the performance of covenants, and the covenant is, that the obligor, before such a day, shall make a farther assurance of lands to the obligee, at the obligor's costs, the obligor having it in his choice what assurance he would make, he ought not to stay for the tender of costs, but should give notice to the obligee what assurance he means to make, and then the obligee is to supply the costs. *Moor*, 454.

If one bind himself before such a time to levy a fine of certain lands to the obligee, it has been held, that the obligee must sue out the writ of covenant to make himself capable of the fine. *Hutt.* 48: 1 *And.* 300: *Co. v.* 127: *Dier*, 371.

If one bind himself to another to deliver 2 cwt. of hops, and that the obligee is to choose them out of 24 bags of the obligors own growing, the obligee is to do the first act; viz. to require the obligor to shew the 24 bags, that he may make his choice. *Mar.* 24.

If a man promise to deliver a thing on such a day, he is bound to do it without request. 1 *Lev.* 284.

But, where A, in consideration of £250 paid by B, and of the farther sum of £250 to be paid, &c. covenanted that he would, with all possible expedition, instruct B in a certain mode of bleaching linen (for which he had obtained a patent); and B covenanted that he would, on or before the 25th of February, 1794, or sooner, if A should before that time have instructed him, &c. pay the farther sum of £250; it was held, that the covenants of A and B were independant covenants, and that A might sue B for the £250, without averring that he had taught B that mode of bleaching linen, &c. 6 *T. Rep.* 570.

It is a general rule, that a man is excused from doing that which becomes impossible to be done by the act of God.

And

And when *the law* creates a duty, and the party is disabled to perform it without any default in him, the law will excuse him: but, when the party *by his own contract* creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity. 6 *T. Rep.* 488.

It is also a general rule, that, when a matter does not lie more properly in the knowledge of one than of the other, no notice is requisite. Thus, in an action of debt for nonperformance of an award, it need not be alleged, that notice was given of the award; because the defendant may take notice of the award as well as the plaintiff. So, upon a treaty of marriage, a promise of the father of the daughter, by the father of the son, to pay the daughter £200 after the death of the son, if she survive him; the father of the daughter dies; the son dies; the administrators of the daughter's father brought an action on this promise; and, by the court, notice of the death of the son need not be given to the father of the son. So, on a promise to pay so much money at the full age of an infant, or on the marriage of I. S. or on the return of such a ship from sea, it has been held, that notice of these events need not be given, because they are facts as notorious to the one as the other. But, when a thing lies more properly in the knowledge of the plaintiff than the defendant, there notice must be given; as, when one agreed to give so much for a commodity as another person had before given, or to give so much for every piece of cloth the plaintiff should buy, or to pay the plaintiff such damages as he had sustained by a battery, or to pay plaintiff's costs of suit. *Hardres*, 42.

Where an act is to be done by each party under a special agreement, and the defendant, by his neglect, prevents the plaintiff carrying the contract into execution, the plaintiff may recover back any money he has paid under it, in an action for money had and received. 7 *T. Rep.* 181.

ADMINISTRATION.

Letters of administration are granted after 14 days from the party's death, but not before. Probates of wills may be obtained immediately.

On taking out letters of administration, no inventory is necessary; but the party must be prepared to state the amount of the effects of the deceased, and must take with him two securities; for, by the *Statute* 22 and 23, Car. II. c. 10, administrators must enter into bonds, with securities, faithfully to perform the trusts reposed in them.

The course of administration is as follows. I. Of the goods of a deceased wife to her husband, or his representatives: or of the husband's to the widow, or next of kin; but the ordinary may grant it to either, or both, at his discretion. — II. Among the kindred, those are to be preferred who are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases. — III. That this proximity of degree shall be reckoned according to the civilians, and not of the canonists, which is adopted by our law on the descent of real estates: and this proximity of the civilians runs first to children; secondly, parents; thirdly, brothers; fourthly, grandfathers; fifthly, uncles or nephews (and the females of each class respectively); and, sixthly, cousins. — IV. The half-blood is admitted to the administration as well as the whole; therefore, the brother of the half-blood shall exclude the uncle of the whole blood; and the ordinary may take the sister of the half or the brother of the whole blood at his discretion. — V. If none of the kindred will take out administration, a creditor may. — VI. If an executor refuse to prove the will or dies intestate, administration may be granted to the residuary legatee, in exclusion of the
next

next of kin. — And, *lastly*, the ordinary may, in default of those, commit administration to such persons as he shall approve of.

All parties, entitled to administration, must renounce, before a creditor is admitted.

If there are two or more administrators, one of them cannot sell goods or release debts without the other ; but in respect to co-executors, they being but one person in law, the act of one is the act of all, and possession of one is accounted the possession of them all.

Although it has been said, that an inventory is not necessary ; yet it is prudent for executors and administrators to exhibit an inventory ; for, if an inventory be in due time *made*, and the goods *valued* and *appraised*, according to the price the things contained in it might be sold for, at that time, by credible and skilful persons, and this inventory be in due time exhibited to the ordinary, on the oath of the executor or administrator, it shall receive credit in all causes and courts ; and he that exhibits it shall be free from the burthen of proving the truth of it, or that the deceased had not more goods ; but the legatee, or other persons, preferring claims, are to prove, that goods have been omitted therein.

If any person interested would have an inventory exhibited on oath, he must enter a caveat.

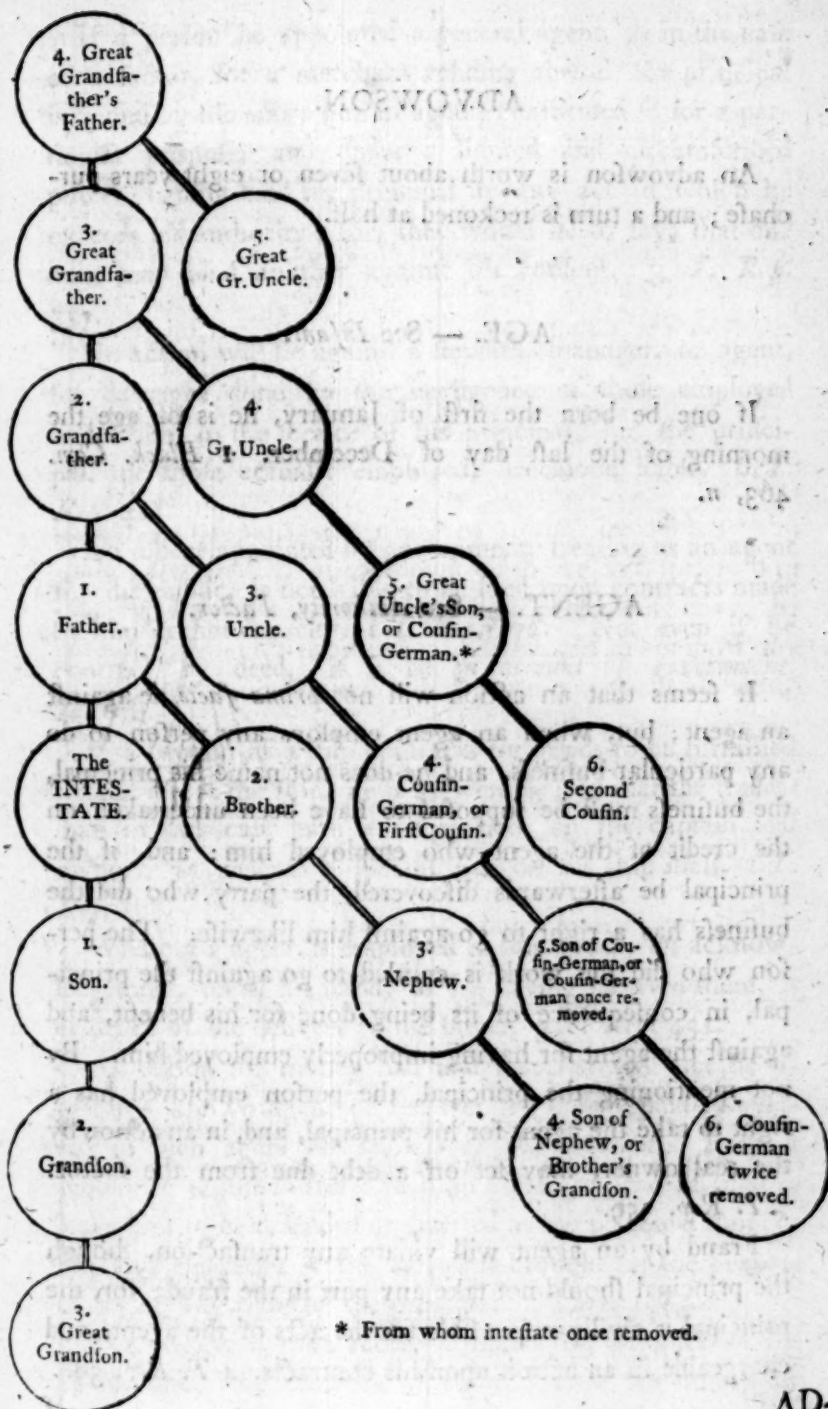
Sometimes, also, it may be prudent for persons having interest to apply, before administration be granted, for a commission for the appraisement of goods, inspection of papers, &c. — This point is mentioned merely to give information to the reader, that such a commission may be obtained ; cases may happen where attention to it may be essentially useful.

Persons should be careful not to interfere in the affairs of deceased persons, except in acts of necessity and humanity, lest they make themselves responsible in the eye of the law

as executors of their own wrong, which may prove highly injurious to them.

Where letters of administration are granted to two, and one dies, the administration survives.

The civil law, by the rules of which the right to administration is regulated, and of which the following table is a scheme, calculates proximity of blood, by counting the number of removes between the intestate and the common ancestor, and down again from him to the person claiming administration; and the whole number of removes gives name to the degree in which the intestate and the claimant are related to each other. For instance, if there be two claiming, the one the son of the cousin-german, and the other the second cousin, we learn which of them is related in the nearest degree to the intestate, in the following manner; viz. first, as to the son of the cousin-german, we reckon from the intestate to his *father*, the first remove; from the *father* to the *grandfather*, (who is the common ancestor of the intestate and person claiming,) the second remove; from the *grandfather* to the *uncle*, the third remove; from the *uncle* to the *cousin-german*, the fourth remove; from the *cousin-german* to his *son*, the fifth remove; so that he is allied to the intestate in the *fifth degree*. Again, with regard to the second cousin, we reckon, from the *INTESTATE* to his *father*, the first remove; from the *father* to the *grandfather*, the second remove; from the *grandfather* to the *great-grandfather*, (who is in this case the common ancestor,) the third remove; from the *great-grandfather* to the *great uncle*, the fourth remove; from the *great uncle* to his *son*, the fifth remove; and, from *him* to *his son*, (who is *second cousin* to the *INTESTATE*,) the sixth remove. He therefore is related to the *intestate* in the *sixth degree*; from which it is clear, that the *son* of the *cousin-german*, being related to the person deceased in the *fifth degree*, is entitled to administration in preference to the *second cousin*, who is related in the *sixth degree*.



ADVOWSON.

An advowson is worth about seven or eight years purchase; and a turn is reckoned at half.

AGE. — See *Infant*.

If one be born the first of January, he is of age the morning of the last day of December. 1 *Black. Com.* 463, n.

AGENT. — See *Authority, Factor*.

It seems that an action will not *prima facie* lie against an agent; but, when an agent employs any person to do any particular business, and he does not name his principal, the business must be supposed to have been undertaken on the credit of the agent who employed him; and, if the principal be afterwards discovered, the party who did the business has a right to go against him likewise. The person who did the work is entitled to go against the principal, in consequence of its being done for his benefit, and against the agent for having improperly employed him. By not mentioning the principal, the person employed has a right to take the agent for his principal, and, in an action by the real owner, may set off a debt due from the factor. 7 *T. Rep.* 359.

Fraud by an agent will vitiate any transaction, though the principal should not take any part in the fraud; for, the principal is civilly responsible for the acts of the agent, and chargeable in an action upon his contracts. 4 *T. Rep.* 39.

If

If a person be appointed a general agent, as in the case of a factor, for a merchant residing abroad, the principal is bound by his acts; but an agent, constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for, that would be to say, that one man may bind another against his consent. 3 *T. Rep.* 357.

No action will lie against a steward, manager, or agent, for damages done by the negligence of those employed under him, in the service of his principal; but the principal, or those actually employed, are alone liable. 6 *T. Rep.* 411.

An officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. 1 *T. Rep.* 172. Not even if he contract by deed, if it be *on account of government*. *Id.* 674.

If a captain of a ship contracts for goods to be furnished for the use of the ship, he is answerable; so that the tradesman in this case hath a claim both on the captain and owners, as well as a specific lien on the ship itself. 1 *T. Rep.* 108.

Where an agent is employed to buy goods, an acknowledgement, under his hand, of his having received them, is evidence of the delivery to the buyer. 3 *T. Rep.* 454.

An action for money had and received will not lie against a known agent or receiver for money paid *voluntarily* to such agent *for the use of the principal*. For, it would be unjust to suffer such an action to proceed, and to leave him to be defended or deserted as the principal thought fit; and especially if the action is brought for the purpose of trying any right of the principal. 4 *Burr.* 1985.

For, where a man receives money for another as his agent, under the pretence of right, (*ex. gr.* for tithe,) the
court

court will not suffer the principal's right to be tried in an action against the collector, if the defendant can shew the least colour of right in his principal; as in this case, by having been some time in possession. *Trin. 27, Geo. II. per Lee, C. J. : Buller, N. P. 133.*

So, where money has been paid to an agent or receiver by mistake, he shall not be liable, if he has paid it over to his principal; for, he should not suffer for another's mistake: but the payer should resort to the principal himself: and, if he has not paid it over to his principal, but has it in his hands, or only given credit for it to his principal in his books, or on an account between them; in these cases he shall be personally liable. *Cowp. 566.*

AGREEMENT.— See *Contracts.*

The stamp-duty on agreements is 10s. except when the matter of agreement does not exceed £20, or where it is for a lease at rack-rent of messuages under £5, or for the hire of servants, or such as relate to the sale of goods. And the number of stamps to be put on an agreement, by the 37 Geo. III. shall be calculated according to the number of common-law sheets of 72 words each, and that there shall be one stamp for every fifteen of such sheets.

Care should be taken how agreements are made with ideots, lunatics, infants, and wives; for, they are, generally speaking, incapable of contracting.

In many cases, the parties injured by breach of agreement may have a remedy by an action at common law; in others, by recourse to a court of equity; but it must be observed, that, wherever the matter in question is merely in damages, there the remedy is at law; because the damages cannot be ascertained by the conscience of the chancellor, but must be settled by a jury. 1 *N. Abr. 69: Abr. Eq. 16.*

But,

But, where the agreement is to do something *in specie*, as to convey lands, execute a deed, &c. the remedy is in equity for a specific performance. 1 *Chan. Caf.* 42.

As to voluntary agreements, it may be observed, that, as men have a right to their acquisitions, so they may dispose of them at their pleasure, and without a valuable consideration; but, if a man promises to convey lands, or to give goods, without a valuable consideration, or without delivering possession of them, this, being *nudum pactum unde non oritur actio*, (a void or naked agreement, whereupon an action will not arise,) does not alter the property in them, nor has the party any remedy either in law or equity. 6 *Co.* 18. Yet, if it be done by deed, duly stamped, and properly executed, under seal, this is good in law, though there be no consideration or no delivery of possession; for, a man cannot deny his own deed, nor affirm any thing contrary to the manifest solemnity of contracting. *Yelv.* 196: *Cro. Jac.* 270: 1 *Brownl.* 111.

And voluntary conveyances are good against the parties, and cannot be revoked; for, a court of equity will not interpose in behalf of one volunteer against another; unless they tend to the injury of creditors, purchasers for a valuable consideration, or younger children; for, then the court will set them aside. 1 *Chan. Rep.* 173: 1 *Vern.* 100, 464.

Defendant purchased cotton for plaintiff as his broker, and engaged for $\frac{1}{2}$ per cent. to guarantee him against loss by re-sale. It was resolved, that the written minute of the first purchase, which proved the guarantee, ought to be admitted in evidence, though not stamped, it being a case excepted in *Stat.* 23, *Geo.* III. c. 58. It was not indeed a contract for the sale of goods, but it arose out of a contract for the sale of them, and was made at the time of the original contract; it therefore related to the sale of them. *ASHURST and BULLER.* This entry need not be stamped; for,

for, this was a contract directly for a sale of goods, or at least it was a contract relating to the sale of them. 5 *T. Rep.* 524.

Parole evidence cannot be admitted to vary the terms, or add to an agreement, which is reduced into writing. 3 *Willf.* 275.

Where agreements are made, with a penalty in case of nonperformance, it is not in the choice of the party to pay the penalty, and so get rid of the agreement; for, a court of equity will enforce the specific performance of the act agreed to be done, unless the penalty or sum, agreed to be paid on nonperformance, can be considered as a sum to be paid by way of liquidated damages. 2 *P. Wms.* 191: 10 *Mod.* 517: 2 *Vez.* 528: *Finch's Rep.* 117: 2 *Vern.* 119. But, where a court of equity goes to compel a specific performance, it will restrain the proceedings at law for recovery of the penalty. — See PENALTY.

Equity will presume an agreement to be abandoned or discharged, if not insisted on during a length of time. 2 *P. Wms.* 82: 9 *Mod.* 2.

If A articles for the sale of land, and covenants to convey, but does not covenant for him and his heirs, yet a court of equity will compel the heir to perform this agreement; forasmuch as A, after sealing such articles, becomes a trustee for the buyer, and the trust with the lands descends to the heir. 2 *Freem.* 199.

ALEHOUSES. — See *Inns* and *Innkeepers*.

As the power of the justices to grant or refuse licenses of alehouses is discretionary, and they are the sole judges, they cannot be compelled by *mandamus* or otherwise. The Court of King's Bench has no power or claim to review the reasons of justices, upon which they form their judgments

ments in granting them, by way of appeal from their judgments, or over-ruling the discretion intrusted to them. But if it clearly appears, that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information; or even possibly by action, if the malice be very gross and injurious. *Burr. Mansf.* 556.

No license shall entitle any person to keep an alehouse in any other place than that in which it was first kept by virtue of such license; and such license, in regard to all other places, shall be void. 26 Geo. II. c. 31, sect. 3.

If a licensed person shall die before the expiration of his license; or if he, or his executors, administrators, or assigns, shall remove from such licensed house, and shall assign such license; or in case any such house shall become empty or unoccupied, the late occupier whereof was duly licensed the year preceding; then (except as after provided) two justices, at a petty sessions, may license the executors, administrators, or assigns, or any new tenant or occupier, upon such removal, or the house becoming empty or unoccupied, until the next general licensing day. Or the justices may allow such executor or administrator, or other persons possessed of any such license, to continue open such house for the purpose aforesaid under such license until the expiration thereof; every such executor, administrator, or assign, and every such tenant or occupier, respectively, obtaining within 30 days after such death or removal, or entering upon the possession of such house, and producing to the said justices the proper certificate, and entering into recognizances. 33 Geo. III. c. 59, sect. 1. And persons, obtaining such certificate, are indemnified till after the petty sessions shall have been held. *Seet.* 7.

And, within Middlesex and Surry, the justices, at the general licensing meeting, shall appoint not less than six,

nor more than eight, special days of meeting yearly, at different equal periods, as near as may be next ensuing such general meeting; and shall cause due notice to be given of the times and places of such special meetings; at which meetings, two justices of the division may grant to the executors, administrators, or assigns, of such licensed person, or the person coming into any such house, which hath become empty or unoccupied, a license to such new tenant or occupier, on his producing a certificate and entering into recognizance; or in their discretion may allow a continuance of any license before granted, until the next general licensing-day. *Seet. 2, 3.*

No person shall retail any distilled spirituous liquors, or strong waters, without a license from the officers of excise, taken out ten days before he shall begin. And such person shall be first licensed to sell ale or spirituous liquors by two justices of the peace. 2 Geo. II. c. 28, sect. 11: 9 Geo. II. c. 23, sect. 14: 16 Geo. II. c. 8, sect. 8, 11: 24 Geo. II. c. 401, sect. 9: 29 Geo. II. c. 12, sect. 22.

Note. — Here is a *double* license required for retailing of spirituous liquors. First, a license from the justices to sell *ale or spirituous liquors*, and then a license by the officers of excise to sell spirituous liquors; and therefore the ale-license ought to run so as to include spirituous liquors, or else the law should be altered in this particular. The printed ale-house-licenses from the Stamp-Office endeavour to preserve the jurisdictions distinct, by excepting the several kinds of spirituous liquors by name out of the license by the justices. But this is against the statutes. Nor was it intended perhaps by the legislature, that the officers of excise should have the sole jurisdiction in this matter; but rather that the primary judgement concerning the same should be referred to the justices.

By the *Stat. 5, Geo. III. c. 46*, persons, lawfully convicted of selling ale or beer, or other excisable liquors, by retail,

retail, without license, (except in fairs, 5 and 6 Edw. VI. c. 25; 3 Geo. I. c. 3: 26 Geo. II. c. 31: and except retailers of spirituous liquors without license, for whom other penalties are provided by law, 9 Geo. III. c. 6,) shall forfeit, for the first offence, 40s. and the costs and expenses of conviction; and, if not paid within fourteen days after conviction, the offender shall be imprisoned for one month; unless he shall sooner pay the penalty, and the costs, charges, and expenses, of conviction and executing the same: for the second offence, £4, and such costs; and, if not paid within one week, imprisonment for two months; unless, &c. as before: and, for the third offence, £6, and such costs; and, if not paid within three days, imprisonment for three months; unless, &c. as before. One moiety to the king, and the other, and all such costs, to the prosecutor. — To be determined by one justice.

ALIEN.

An *alien* is one born out of the obedience and dominions of the king; and, while he continues unnaturalized, he cannot purchase or inherit lands in England. *Vaug.* 227, 291. Nor can he be inherited. 1 *Sid.* 193, 198. And, if a woman-alien, whether friend or enemy, marries a subject, she shall not be endowed. *Co. Lit.* 31, a. Nor shall aliens be tenants by the curtesy. 7 *Co.* 25.

The son of an alien father and English mother, born out of the king's allegiance, cannot inherit to his mother in this country. 4 *T. Rep.* 300.

Alien friends may trade as freely as other people, only they are subject to higher duties.

An alien friend may have personal actions, but not real. 2 *Esplin. Rep.* 581, 622. — An alien enemy, neither real, personal, or mixed. *Co. Lit.* 129, b.: 1 *And.* 25: *Dier.* 2, b.: 6 *T. Rep.* 23.

If an alien purchase lands, the king shall have them upon office found; but, if an alien purchase and die, then the freehold is in the king without office found; because no man can take it as heir to the alien, therefore the freehold is cast upon the king. *Co. Lit.* 2: 1 *Leon. pl.* 61.

Aliens may become subjects by *denization* and by *naturalization*; the former is by the king's letters patent, the latter by act of parliament. A denizen may purchase and transmit lands by descent to those born after his denization; but he cannot inherit to another relation. One naturalized inherits in all things as a natural-born subject. *Palm.* 13: *Co. Lit.* 8, a.: *Style's Rep.* 139: *Cro. Jac.* 539.

A devise of land to an alien is void. And, if a man be bound to an alien enemy, the bond is void to him, but the king shall have it. *Danv.* 322: 1 *Lev.* 69.

ANNUITIES. — See *Usury*.

The stamp is such as is proper for deeds to be enrolled.

When an annual sum, to which a person is entitled, is chargeable on the person only, it is called an *annuity*; when charged upon and issuing out of land, it is denominated a *rent-charge*.

Upon the sale of a life-annuity, or for a term of years, or greater estate, determinable on lives, of more than £10 per annum, the true consideration, which shall be in money, shall be described in the security; and a memorial shall be enrolled in chancery, within twenty days after its execution, (exclusive of the day of execution, 5 *T. Rep.* 283,) or it will be invalid. — But the act exempts annuities given by will, marriage-settlement, or for the advancement of a child; and annuities secured upon lands of equal or greater annual value, whereof the grantor was seized in fee or in tail in possession; or where granted without any pecuniary confi-

consideration, or by actual transfer of stock, the dividends being of equal value with the annuity, (6 *T. Rep.* 596;) or by any body corporate, or under an act of parliament. And, where an annuity for £10 or less is granted, it must be enrolled, where there is more than one such annuity between the same parties, or in trust for the same person. 17 Geo. III. c. 26.

And it is held, that the consideration-money paid for the annuity may be recovered in an action for money had and received, where the securities are set aside for informality: but see 1 *T. Rep.* 732: 2 *T. Rep.* 366: and 1 *Espin. Rep.* 309.

If any part of the consideration shall be (directly or indirectly) returned to or retained by the party advancing the same, or if the consideration or any part shall be in goods, the annuitant may apply to the court, in which any action may be brought, to stay proceedings, and the court may order the assurance to be cancelled, and any judgement to be vacated. *Same Stat. sect. 4.*

All contracts for the purchase of an annuity with an infant under 21 years of age shall be utterly void and unconfirmable at age. And persons, soliciting infants to grant annuities, or advancing money to them, on condition of their granting annuities when of age, or engaging them by oath and promise not to plead infancy, and sellers or brokers demanding gratuities for procuring money, (beyond 10s. per cent.) shall be adjudged guilty of a misdemeanor, and liable to fine, imprisonment, and corporal punishment. *Sect. 6, 7.*

The memorial must contain the date of the deed, the names of all the parties, and for whom any of them are trustees, and of all the witnesses; also the annual sum to be paid, and the name of the person for whose life the annuity is granted, and the consideration. *Sect. 1, 2.* Notes, given as part of the consideration, (which, if actually

given,

given, *bonâ fide* are to be understood as money,) must be circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. 3 *T. Rep.* 288. The redemption of a former annuity, at a higher price than it was purchased at, is a good consideration. 5 *T. Rep.* 283.

In the deed, the consideration really paid, (which shall be in money only,) and also the person by whom and on whose behalf the consideration shall be advanced, shall be set forth in words at length; otherwise such deed shall be void. *Same Stat. sect. 4.*

When a judgement has been entered upon an annuity-bond, the whole penalty of the bond ought not to be levied, but only the arrears then due; and the judgement is permitted to stand as a security, with liberty to take out execution as future arrears shall arise.

Q. Whether, in this case, a writ of inquiry should not previously be executed?

Money lent and paid at different times, for the education and advancement of the defendant, is a good consideration under section 3 of the act. 7 *T. Rep.* 551.

If there be any fraud, either direct or constructive, in obtaining annuities, or the parties appear to be within the range of that policy, which gives to particular descriptions of persons an extraordinary claim to protection, courts of equity will interpose and give relief; but, if the transaction is not chargeable with fraud and imposition, and the parties to it are *sui juris*, and not in a situation which gives them peculiar claims to protection, courts of equity, in case of annuities, as do the courts of law, leave money to find its own value; no act of parliament having prescribed any regulation as to the price of annuities. — Lord Thurlow, in the case of *Heathcote v. Poughon*, 2 *Bro. Rep. c. 175*, observed, that, if mere inadequacy of price is the ground of rescinding the contract for an annuity, it should seem that

that it is scarcely sufficient; but there is a difference between that and evidence arising from inadequacy. If there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed as that he was glad to make it, knowing its inadequacy, it would have a command over him which amounts to a fraud.
1 Fonbl. Eq. 237, n.

Amidst all the substantial advantages derived from the operation of the statute, 17 Geo. III. c. 26, so much inconvenience and injury have been sustained, that the legislature, it is said, means to give to the judges an equitable jurisdiction, by which they will be able to give full scope to its remedial operations, and at the same time save from its penal influence men who have done no wrong.

A TABLE for ascertaining the value of annuities, leases, and reversions, for any number of years, from one to seventy.

Years.	Present Worth of £1 per Ann. at 4 per Cent.			Ditto at 5 per Cent.			Ditto at 6 per Cent.			Ditto at 7 per Cent.		
	£.	s.	d.	£.	s.	d.	£.	s.	d.	£.	s.	d.
1	0	19	2½	0	19	0½	0	18	10½	0	18	8½
2	1	17	8½	1	17	2½	1	16	8	1	16	1½
3	2	15	6	2	14	5½	2	13	5½	2	12	5½
4	3	12	7	3	10	11	3	9	3½	3	7	8½
5	4	9	0½	4	6	7	4	4	2½	4	4	0
6	5	4	10	5	1	6	4	18	4	4	15	3½
7	6	0	0½	5	15	8½	5	11	7½	5	7	9½
8	6	14	7½	6	9	3	6	4	2½	5	19	5
9	7	8	8½	7	2	1½	6	16	0½	6	10	3½
10	8	2	2½	7	14	5	7	7	2½	7	0	5½
11	8	15	2½	8	6	1½	7	17	8½	7	9	11½
12	9	7	8½	8	17	3	8	7	8	7	18	10½
13	9	19	8½	9	7	10½	8	17	0½	8	7	1½
14	10	11	3	9	17	11½	9	5	10½	8	14	10½
15	11	2	4½	10	7	7	9	14	2½	9	2	1½
16	11	13	0½	10	16	9	10	2	1½	9	8	11
17	12	3	3½	11	5	5½	10	9	6½	9	15	3
18	12	13	2	11	13	9½	10	16	6½	10	1	2
19	13	2	8	12	1	8½	11	3	1½	10	6	8½
20	13	11	9½	12	9	2½	11	9	4½	10	11	10½
21	14	0	7	12	16	5	11	15	3½	10	16	8½
22	14	9	0½	13	3	3	12	0	9½	11	1	2½

Years.	Present Worth of £1 per Ann. at 4 per Cent.			Ditto at 5 per Cent.			Ditto at 6 per Cent.			Ditto at 7 per Cent.		
	£.	s.	d.	£.	s.	d.	£.	s.	d.	£.	s.	d.
23	14	17	19 6	13	9	9 4	12	6	0 2 2	11	5	5 3 3
24	15	4	11 1 1	13	15	11 1 7	12	11	0 3	11	9	4 1 6
25	15	12	5 1 2	14	1	10 2 2	12	15	8	11	13	0 1 4
26	15	19	7 1 5	14	7	6 1	13	0	0 1 1	11	16	6 7
27	16	6	7 4	14	12	10 1 3	13	4	2 1 1	11	19	8 1 3
28	16	13	3 5	14	17	11 1 2	13	8	1 1 9	12	2	8 1 7
29	16	19	8 4	15	2	9 1 4	13	11	9 1 1	12	5	6 1 6
30	17	5	10 4	15	7	5 1 6	13	15	3 1 3	12	8	2 7
31	17	11	9 9	15	11	10 1 1	13	18	6 1 9	12	10	7 1 6
32	17	17	5 1 6	15	16	0 1 6	14	1	8 7	12	12	11 7
33	18	2	11 1 8	16	0	0 1 5	14	4	7 1 4	12	15	0 1 6
34	18	8	2 1 7	16	3	10 1 2	14	7	4 1 4	12	17	1 1 1
35	18	13	3 1 1	16	7	5 1 2	14	9	11 1 3	12	18	11 1 8
36	18	18	2	16	10	11 1 1	14	12	5 1 1	13	0	8 1 9
37	19	2	10 9	16	14	2 1 8	14	14	8 1 3	13	2	4 4 4
38	19	7	4 1 1	16	17	4 1 1	14	16	11 2	13	3	10 1 7
39	19	11	8 1 1	17	0	4 4	14	18	11 1 1	13	5	3 1 4
40	19	15	10 1 1	17	3	2 7	15	0	11 4	13	6	7 1 5
41	19	19	10 1 3	17	5	10 1 6	15	2	9 1 5	13	7	10 1 4
42	20	3	8 1 4	17	8	5 1 3	15	4	5 1 6	13	9	0 1 4
43	20	7	5	17	10	11 1 1	15	6	1 1 9	13	10	1 1 7
44	20	10	11 1 1	17	13	3 2	15	7	7 1 9	13	11	1 1 7
45	20	14	4 1 3	17	15	5 1 1	15	9	1 1 6	13	12	1 1 3
46	20	17	8 1 3	17	17	7 9	15	10	5 1 4	13	13	0
47	21	0	10 1 2	17	19	7 1 8	15	11	9 1 5	13	13	10
48	21	3	10 1 4	18	1	6 1 1	15	13	0	13	14	7 1 2
49	21	6	9 1 8	18	3	4 1 1	15	14	1 1 3	13	15	4 1 1
50	21	9	7 1 9	18	5	1 1 7	15	15	2 1 4	13	16	0 1 7
51	21	12	4 8	18	6	9 1 4	15	16	3 1 5	13	16	7 1 2
52	21	14	11 1 7	18	8	4 1 3	15	17	2 1 9	13	17	2 1 7
53	21	17	5 1 8	18	9	10 1 7	15	18	1 1 7	13	17	9 1 3
54	21	19	10 1 2	18	11	3 1 6	15	19	0	13	18	3 1 1
55	22	2	2 3	18	12	8 1	15	19	9 1 1	13	18	9 1 4
56	22	4	4 1 1	18	13	11 1 6	16	0	6 1 7	13	19	3
57	22	6	6 1 7	18	15	2 1 1	16	1	3 1 4	13	19	8 4
58	22	8	7 4	18	16	4 1 8	16	1	11 1 1	14	0	0 1 3
59	22	10	6 1 3	18	17	6 7	16	2	7 1 9	14	0	5 1 1
60	22	12	5 1 5	18	18	7 1	16	3	2 1 1	14	0	9 1 6
61	22	14	3 1 3	18	19	7 1 1	16	3	9 1 5	14	1	1 1 1
62	22	16	0 1 7	19	0	6 1 7	16	4	4 4	14	1	4 1 6
63	22	17	8 1 8	19	1	6	16	4	10 8	14	1	8 1 1
64	22	19	4 1 8	19	2	4 1 4	16	5	3 1 8	14	1	11 1 8
65	23	0	11 8	19	3	2 1 6	16	5	9 1 6	14	2	2 1 6
66	23	2	5 1 1	19	4	0 1 1	16	6	2 1 1	14	2	5 1 6
67	23	3	10 1 3	19	4	9 1 5	16	6	7 1 4	14	2	7 1 9
68	23	5	3 1 1	19	5	6 3	16	6	11 1 7	14	2	10 1 6
69	23	6	7 1 1	19	6	2 1 5	16	7	4 1 1	14	3	0 1 6
70	23	7	10 1 8	10	6	10 1 1	16	7	8 1 2	14	3	2 1 1

EXAMPLES.

1. What is the present worth of £10. 10s. per annum, for 50 years, reckoning money at 4 per cent.?

In

In the column of 4 per cent. against 50 years, is £21 9s. 7½d. 9; which, multiplied by £10 10s. gives £225 11s. 3d. 4, the answer.

$$\begin{array}{r}
 \text{£.} \quad \text{s.} \quad \text{d.} \\
 21 \quad 9 \quad 7\frac{1}{2} \quad 9 \\
 \hline
 \phantom{7\frac{1}{2}} 10
 \end{array}$$

Half of £21 9 7½ 9, 10 14 9½ 4 for the 10s. or half of £1. — The remaining 4 is the nearest half of 9 for 10s. or the half of a pound sterling.

2. What annuity for 50 years should be granted for a consideration of £225 11 3, reckoning money at 4 per cent. ?

Divide £225 11 3, the sum paid, by £21 9 7½, the present value of £1 annuity for 50 years, and it gives £10 10s. the answer, and is a proof of the former question.

Note. — The value of leases may be ascertained the same way. For instance, what is the value of a lease, 50 years of which are unexpired, which produces £10 10s. per annum ?

So may also the value of Exchequer-orders of any amount, and for any time.

3. To find the present value of the reversion of an estate in perpetuity, after an assigned term of years: first, find the value of the perpetuity, by dividing 100 by the rate per cent. at which interest is reckoned; then subtract the term of the lease from the fee-simple, or perpetuity, and multiply the remainder by the annuity.

Let the yearly rent be £50, the lease 60 years, and the interest 4 per cent.; then it appears, that the present value of the fee-simple is 25 years, that of the lease, for 60 years to come, £22 12 5½; and the difference of these, or the worth of £1 per annum in reversion after 60 years are expired,

pired, will be £2 7 6½ 5; which, multiplied by 50, gives the answer.

$$\begin{array}{r}
 \text{£.} \quad \text{s.} \quad \text{d.} \\
 2 \quad 7 \quad 6\frac{1}{2} \quad 5 \\
 \hline
 \phantom{6\frac{1}{2}} 50 \\
 \hline
 \text{£} 118 \quad 16 \quad 6\frac{1}{2}
 \end{array}$$

4. To find the present value of an annuity certain in reversion.

Find by the table the present value of £1 per annum for the time in being, and also for the time in being and in reversion; subtract the first from the last, and multiply the annuity by the remainder.

Let the term in reversion be 7 years, and the term in being 14 years; or, in other words, let 7 years be added to 14 years, the annuity being £50, and interest 4 per cent.; take the value of 21 years from the table, viz. £14 0 7, and value of 14 years, which is £10 11 3 6, and the difference of these is £3 9 3¼ 4; which, multiplied by £50, gives £173 6 0½, the present value.

$$\begin{array}{r}
 \text{£.} \quad \text{s.} \quad \text{d.} \\
 14 \quad 0 \quad 7 \quad \text{value of £1 for 21 years.} \\
 10 \quad 11 \quad 3 \quad 6 \quad \dots \dots \text{for 14 years.} \\
 \hline
 3 \quad 9 \quad 3\frac{1}{4} \quad 4 \\
 \phantom{0\frac{1}{2}} 50 \\
 \hline
 \text{£} 173 \quad 6 \quad 0\frac{1}{2}
 \end{array}$$

5. To increase the number of years in a lease, or to ascertain the value of a lease, which is not to commence till an old one expires.

Example. A lease has 4 years to run at the rent of £1, and a new lease is to be granted for 21 years, on expiration of the old lease, to pay 5 per cent.

Add

Add 4 years to the 21 years, it makes 25 years: I find the value of 25 years to be £14 1 10½ 2, and the value of 4 years to be £3 10 1 1: I then subtract the one from the other, and the remainder is the value of the proposed lease.

£.	s.	d.
14	1	10½ 2
3	10	1 1

£10 10 11½ 1 the present value.

And, whatever the rent is, it must be multiplied by this sum, and the product will be the answer.

Note. — Where an annuity has been declared void for some defect in the memorial, and the attorney who prepared the deeds is sued for negligence, and pays the money, given for the consideration, to the grantee, he cannot maintain an action against the grantor to recover the money back from him. 2 *Espin. Rep.* 527.

A TABLE

A TABLE *showing the value of an annuity on one life at*
3, 4, and 5, per cent. interest.

Age.	Years Purchase at 3 per Cent.		Ditto at 4 per Cent.		Ditto at 5 per Cent.		Age.	Years Purchase at 3 per Cent.		Ditto at 4 per Cent.		Ditto at 5 per Cent.	
	s.	d.	s.	d.	s.	d.		s.	d.	s.	d.	s.	d.
6	18	8	16	2	14	1	41	13	0	11	4	10	2
7	18	9	16	3	14	2	42	12	8	11	2	10	1
8	19	0	16	4	14	3	43	12	6	11	1	10	0
9	19	0	16	4	14	3	44	12	5	11	0	9	9
10	19	0	16	4	14	3	45	12	3	10	8	9	8
11	19	0	16	4	14	3	46	12	1	10	7	9	7
12	18	9	16	3	14	2	47	11	9	10	5	9	5
13	18	7	16	2	14	1	48	11	8	10	4	9	4
14	18	5	16	0	14	0	49	11	6	10	2	9	3
15	18	3	15	8	13	9	50	11	4	10	1	9	2
16	18	1	15	6	13	7	51	11	2	9	9	9	0
17	17	9	15	4	13	5	52	11	0	9	8	8	9
18	17	6	15	2	13	4	53	10	7	9	6	8	8
19	17	4	15	0	13	2	54	10	5	9	4	8	6
20	17	2	14	8	13	0	55	10	3	9	3	8	5
21	17	0	14	7	12	9	56	10	1	9	1	8	4
22	16	8	14	5	12	7	57	9	9	8	9	8	2
23	16	5	14	3	12	6	58	9	6	8	7	8	1
24	16	3	14	1	12	4	59	9	4	8	6	8	0
25	16	1	14	0	12	3	60	9	2	8	4	7	9
26	15	9	13	8	12	1	61	8	9	8	2	7	7
27	15	6	13	6	12	0	62	8	7	8	1	7	6
28	15	4	13	4	11	8	63	8	5	7	9	7	4
29	15	2	13	2	11	7	64	8	3	7	7	7	3
30	15	0	13	1	11	6	65	8	0	7	5	7	1
31	14	8	12	9	11	4	66	7	8	7	3	6	9
32	14	6	12	7	11	3	67	7	6	7	1	6	7
33	14	4	12	6	11	2	68	7	4	6	9	6	6
34	14	2	12	4	11	0	69	7	1	6	7	6	4
35	14	1	12	3	10	9	70	6	9	6	5	6	2
36	13	9	12	1	10	8	71	6	7	6	3	6	0
37	13	7	11	9	10	6	72	6	5	6	1	5	8
38	13	5	11	8	10	5	73	6	2	5	9	5	6
39	13	3	11	6	10	4	74	5	9	5	6	5	4
40	13	2	11	5	10	3	75	5	6	5	4	5	2

At the age of 68, the value in this table coincides with Dr. Price.

Before that age, this table is lower; after that age, higher: at 35, and 4 per cent. the difference is above two years.

After

After all the pains which have been taken, it is impossible to ascertain, with any sort of precision, the duration of any single life.

Note. — The value of annuities in the preceding table supposes the payments to be made *yearly*, and to begin at the end of the year. If they are payable half-yearly, and to begin at the half-year's end, their value will be increased about *one-fifth* of a year's purchase.

The use of the table is obvious. — What is the value of £20 per annum for the life of a person aged 45, interest at 5 per cent.

Against the age 45 stands £9 8

Which multiply per annuity, 20

£196 0

The inhabitants of London not living so long as persons residing in more healthful situations, the value of single lives there is less than others. Mr. Simpson's tables are calculated from observations made in that city.

It is recommended, that, in the grant of personal annuities, not only a bond be given for the payment of the annuity, but that a deed of covenants for the payment of the annuity be executed; for, where such deed is executed, the growing payments are contingent, and an action will lie against the covenantor after bankruptcy and certificate. *T. Rep.* 86.

APPRENTICES.

The present stamp-duty (1800) on each part of the indentures is 10s.; and, by the *Stat.* 37, Geo. III. c. 111, after the 1st of August, 1797, an additional 10s. on each part is imposed, where a greater sum than £10 is given.

Indentures

Indentures of parish-apprentices are charged with a duty of 6*d.* each part: and apprentices bound out by trustees of charities, 1*s.* each part.

And, when a premium is given with an apprentice, the indenture must, within the bills of mortality, within one month, and elsewhere within two months, after the date, be taken to the Stamp-Office, in the former case; or, in the latter, either to the Stamp-Office or to the collector of the stamp-duties; and the master or mistress shall pay a duty of 6*d.* in the pound upon sums given, from £1 to £50; and of 1*s.* for every pound for all above £50, that is, for £51 and upwards. 8 Anne, c. 9.

The meaning of this statute clearly is, that, when money or money's worth is given to the master, by the friends of the apprentice, by way of premium, a duty ought to be paid for it; but that, where meat, clothes, &c. are to be provided by the parent, no duty is payable, because there is not any thing given to the master. What is given for the benefit of the master, duty must be paid for; but what is given for the benefit of the apprentice is not within the words of the statute.

By 5 Eliz. c. 4, an infant may voluntarily bind himself apprentice by indenture, but no remedy at law lieth against an infant on his covenant. If the father covenant, it will of course bind the father, but the son must be a party, or it is no apprenticeship. 8 Mod. 190: Doug. 500.

A man may by law chastise and correct his apprentice for neglect or other misbehaviour, so as it be done with moderation; but it does not seem to be lawful for a master or mistress to beat any other servant of full age. Lamb. 127: 1 Black. 428.

The master may not of his own accord discharge his apprentice; but, if they cannot agree, they may proceed in one of these two ways: either upon the Stat. 5 Eliz. or 20 Geo. II. c. 19; for, by virtue of these statutes, apprentices

prentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sessions; who may, by the equity of the statute, if they think it reasonable, direct restitution of a rateable proportion of the money given with the apprentice. *Salk.* 67. And parish-apprentices may be discharged in the same manner by two justices. *Stat.* 20, *Geo.* II. c. 19. But, if an apprentice, with whom less than £10 has been given, runs away from his master, he is compellable to serve out his term of absence, or make satisfaction for the same, at any time within 7 years after the expiration of the original contract. *Stat.* 6, *Geo.* III. c. 26. And, by *Stat.* 32, *Geo.* III. c. 57, where a parish-apprentice is discharged from his master on account of the master's misconduct, the justices may order the master to deliver up his clothes, and to pay a sum not exceeding £10 to place him with another master. And, where a parish-apprentice is discharged under this statute for misbehaviour, he may be committed to the house of correction, for any time not exceeding three months.

If an apprentice leaves his master's service before his time is expired, the master is entitled to all his earnings by the common law of the land. *Vez.* 83. And, by *Stat.* 6, *Geo.* III. c. 25, the apprentice, if found within 7 years after the expiration of his time, may be compelled to serve his master for the time he absented himself, unless he shall make his master satisfaction: and, if he shall refuse to give security for such satisfaction as the magistrate shall award, he may be committed for any time not exceeding three months. Persons, aggrieved by such determination, may appeal to the sessions, except on an order of commitment.

If an apprentice be impressed into the sea-service, the master cannot sue out a *habeas corpus* to bring him up to be discharged, though the apprentice may. But the lord chief-

chief-justice of the court of King's Bench may issue a warrant to bring him up, on an application either of the master or the apprentice. 7 *T. Rep.* 745.

If a person entice away an apprentice, he may be indicted, and the master has a remedy for damages by action. 6 *Mod.* 182 : *Burr. Mans.* 1306.

The master assigning, and the apprentice consenting, will not make him an apprentice; but, by the custom of London, he may be turned over to another. *Dalt.* c. 58. And an assignment to the sea-service is good by the statute.

An apprenticeship is a personal trust between the master and apprentice, and determines by the death of either of them: and, where a master dies, an apprentice is not obliged to serve the executors or administrators for the remainder of the term. *Str.* 1266 : 1 *Salk.* 66.

By the *Stat.* 32, Geo. III. c. 57, in case of the death of the master or mistress of a parish-apprentice, with a premium not exceeding £5, the justices shall, within three months after the decease of the master, by endorsement on the indenture, direct the apprentice to serve another master; and so *toties quoties*.*

Whatever an apprentice gains is for the use of his master; and, whether he was legally bound or not, is not material, if he was an apprentice *de facto*.† *Salk.* 68. Enticing an apprentice to embezzle goods is indictable. 1 *Salk.* 380. A master may be indicted for not providing for, or turning away, an apprentice. If a master gives an apprentice license to leave him, it cannot be recalled. *Mod. Caf.* 70. If an apprentice marries without the master's privity, that will not justify his turning him away; but he must sue his covenant. 2 *Vern.* 492. By the custom of London, a freeman may turn away his apprentice for gaming. *Id.* 241. As no apprentice can be made without writing, so none may be discharged by his master but by

* That is, as often as it shall happen.

† In fact.

writing

writing under his hand, and with the allowance of a magistrate. *Dalt.* 121.

Masters and apprentices in the city of LONDON are regulated by the customs of that city.

By that custom, 1. Every apprentice, bound to a freeman, must be full fourteen years of age, and his indenture must not be for a less term than seven years. If he break any of the covenants, an action may be brought against him as if he were of full age. *Green's Privileges of the City*, 27.

2. Every freeman ought to enrol his apprentice within the first year of his time, before the chamberlain. If the apprentice be not enrolled within the first year of his time, he may at any time be discharged from his master for not being enrolled, without any other cause. *Ibid.* 28.

3. If an apprentice shall refuse to be enrolled within the first year, the master may bring his indenture to the chamberlain, who will record the same; which record is as good as an enrolment, and will bar the apprentice from suing out his indenture for not being enrolled. *Ibid.*

4. An apprentice in London may be discharged from his master, 1. if the master gives him unmerciful correction: 2. if he doth not provide for him good and wholesome necessaries: 3. if he turn him away, or shall refuse to receive him into his service: 4. if he leave off trade, and do not provide for the apprentice another master: 5. if the master remove out of the freedom: 6. if he shall neglect or refuse to instruct the apprentice in his art and trade: 7. if the apprentice shall be under the age of fourteen when bound: 8. or shall be bound for less than seven years: 9. or if he be not enrolled within the first year. *Idem*: and *Emerson*, 66.

5. In order to the discharge, the apprentice must bring his indenture, or a copy of it, to an attorney of the lord-mayor's court, who will immediately cause notice to be

D

given

given to the master by a proper officer, of the apprentice's intention to sue out his indenture, and for what cause; and, after four court-days, will summon the master to shew cause why the apprentice shall not be discharged. If the complaint be for not being enrolled, the master cannot prevent it; but, if it be for any of the other causes before-mentioned, the master may appear, and plead and try the matter: no costs in this case are given to either party. *Green, 31.*

6. If an apprentice shall be disorderly, or commit any great fault, upon complaint and proof made thereof, the chamberlain will commit him to *Bridewell*. *Id. 207.*

7. When an apprentice hath faithfully served the full term of seven years, and his master shall refuse to make him free, the chamberlain, upon complaint made, will cause the master to be summoned before him; and, if the master cannot shew good cause for such his refusal, he will make the apprentice free. And, if a freeman shall refuse to appear before the chamberlain, being duly summoned, the lord-mayor or recorder, upon complaint, will grant a warrant to compel him to appear. *Id. 206.*

8. Where an apprentice is by consent to be turned over to another master, he must first be turned over by the company where he was bound, and then be turned over by the chamberlain, which is an enrolment, and discharges the first master, and binds the other parties. *Id. 207.*

9. In case of difference between the master and apprentice, it is the interest and advantage of the parties to refer the matter to the chamberlain, rather than to go into a more expensive course of litigation. *Id. 208.*

10. If an apprentice wilfully omit to take up his freedom within a reasonable time, the chamberlain may fine him. *Id. 209.*

11. A master may be disfranchised for testifying that his apprentice had served a freeman, if in fact he was turned
over

over to a foreigner; or that he had served seven years, if he had not done so. *Ibid.*

ARBITRATIONS.

Stamp-duty on awards, 5s. and 5s. total 10s. if under hand only; if under hand and seal, the same as for any other deed.

An arbitration is a summary method of adjusting disputes and controversies; and is wisely calculated to put an end to discord, preserve harmony, and save expenses; and, as it is a practice attended with very beneficial effects, it is earnestly recommended to all persons previously to their engaging in law-suits, in all instances to which it is applicable: and these are all cases of trespass; of inadvertent, or perhaps intentional, injury; of account, where the questions in dispute go to the general liquidation of them, to the allowance or non-allowance of certain items, to the amount of the sums charged, or where they are long and intricate; all disputes between copartners in trade or merchandize; and, indeed, all cases where the determination does not depend on intricate questions of law.

It is a common practice for parties to go to a reference, after much expense has accrued in law-proceedings; and, in matters of account, it is a constant and invariable practice of the courts of law, when such cases come before them for trial, to recommend the final adjustment of them to arbitration. But, in these instances, the parties unwisely spend large sums of money to no good purpose. It is surely more prudent, in the first instance, to prefer the more lenient measure of arbitration.

It is by all means advisable, that an attorney should be employed, whose professional abilities and conduct entitle him to the confidence of his employers, and who is known to be a promoter of peace and good neighbourhood. It is necessary that an attorney should be employed for three im-

portant reasons: 1. Because it throws great weight into the first application for a reference; for, if he be an honest man, and uses fair endeavours, he will be much more likely to prevail, than if the application be made by an unprofessional man. 2. Because, by employing an intelligent attorney, the matter on both sides is likely to be brought fairly and properly before the arbitrators for their decision. 3. Because, with such assistance, the award to be made (which is liable to many legal niceties) is the more likely to be effectual and final, and so to prevent a continuation or renewal of hostilities between the parties.

The party disposed to pursue this method will do well, in the next place, to require that his attorney should, in the presence of a competent witness, make the opposite party proposals for a reference. This may be attended with good effect in securing such party against costs in the event of the business; for, if it should happen (and which is frequently the case) that the party applied to should refuse to refer the matter, so that the party offering such reference should be obliged to commence an action, and, in any stage of that action, the subject in dispute should at length be referred, it would be good ground to be offered to the consideration of the arbitrators, to throw the burden of the costs upon the pertinacious party.

1. *As to the submission.*

We will suppose that the parties have agreed to a reference: the next step is to make that agreement binding. This should be done by bond, with an agreement that the award should be made a rule of court. But it may be done by indenture. 2 *Mod.* 73.

In all cases, where the demand arises upon a deed, the submission ought to be by deed. *Rol. Abr. tit. Arbitr.*

In some cases, it is prudent to insert in the submission a clause, that no bill in equity shall be filed against the arbitrators.

Arbi-

Arbitrations are of two kinds: first, where there is a cause depending in court; secondly, where no cause is depending. The submission in the former case is either by rule of court before the trial, or by order of *nisi prius* at the trial, which is afterwards made a rule of court; and, upon a submission of this kind, the plaintiff usually takes a verdict for his security, particularly when there is special bail, who would not otherwise be liable for the sum awarded. In the other case, the submission is *by agreement* of the parties, which is either in writing or by parole; or by the positive directions of an act of parliament, as in the case of inclosure-acts. 2 *Tidd's Prac.* c. 26, p. 731.

All the cases of awards, reported in the books for a long series of years, appear to have been made on submissions by the act of the party only; and such submissions are still very frequent. But others are referred by the legal tribunals with the consent of the parties, under a rule of *nisi prius*; and, by the *Stat. 9 and 10, Will. III. c. 15*, it is enacted, that it shall and may be lawful to and for all traders and merchants, and others, desiring to end by arbitration any controversy, suit, or quarrel, for which there is no remedy but by personal action, or suit in equity, to agree that the submission of their suit, to the award or umpirage of any person or persons, should be made a rule of any of his majesty's courts of record. And, in case of any such submission, and disobedience to the arbitrator and umpire, the party, neglecting or refusing, shall be subject to all the penalties of contemning a rule of court. See 1 *Str.* 1, 2: 2 *Str.* 1178: 10 *Mod.* 332, 3: *Barnes*, 55, 8: 1 *Salk.* 72: *Comyns*, 114: 1 *L. Raym.* 664.

As it is essential in an award that it should be made, with respect to persons and things, according to the submission, it is necessary to be particularly careful that the submission be so worded as to comprehend the whole matter to which

it is meant to extend ; and then the award must be carefully made to accord with the submission. 2 *Mod.* 309.

If a submission be by word, the party may revoke it at pleasure, but he must give notice to the arbitrators themselves of the revocation ; but it need not be in writing. And, if it be a submission by writing without bond, it may be revoked, although made irrevocable by the strongest words ; but notice of the revocation must be given in writing. But, if it be by bond, the party who revokes forfeits his obligation. 8 *Co.* 82. — And, if the submission be made a rule of court in pursuance of the statute, if either of the parties revoke, the court will grant an attachment. But see 2 *Keb.* 10, 20, 24 ; and *quære*, whether an action on the case would not lie for countermanding the authority of the arbitrator ?

The agreement to a reference must be expressed with great caution and accuracy ; for, if it is agreed to refer all *matters in difference between the parties in the cause*, the arbitrators are not confined to the subject of the cause alone, as they are when it is agreed to refer all *matters in difference in the cause between the parties*. 2 *Black.* 1118 : 2 *T. Rep.* 645 : 3 *T. Rep.* 626. — Yet, after an award under a reference in the first case, either party may maintain an action for a right or demand subsisting at the time of the reference, but not disputed or referred to the arbitrators. 4 *T. Rep.* 146.

2. *As to the matters which may be referred.*

In addition to what has been already said, it is to be observed, that *criminal matters*, such as treasons, murders, felonies, and other indictable offences, cannot be submitted to arbitration ; but it seems that in cases of assault, battery, libel, and the like, the parties may refer ; but an award, in these cases, will not screen the offender from a criminal prosecution.

Matters,

Matters, concerning the contract or dissolution of marriage, cannot be referred; but the damages a person may sustain by a breach of marriage-promise, or matters relating to marriage-portions, may.

And also freehold, copyhold, and leasehold lands, rent-charges, &c. cannot be made to pass by award; yet, when any dispute, concerning the title to them, is referred by bond, the party is liable to pay the penalty of the bond if he refuses to act according to the award; but, in awards of this nature, the arbitrators must not merely award the lands to the party, but that the one, by good and sufficient ways and means in the law, do convey, transfer, and assure, to the other.

And the present rule of law is, that, where the parties might, by their own act, have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it: and the arbitrator may order the same acts to be done which the parties themselves might do by their own agreement. 6 *Mod.* 231: *Cro. El.* 223: *Dier*, 183, n. But, in this case, all must be done by deed.

So it is said, that a debt, due by an *instrument under seal*, which the law calls a specialty, cannot be discharged by a mere award; but, if the submission be by bond, the award will be a good bar; for, one specialty may be dissolved by another.

3. *As to making the award.*

The arbitrators cannot enjoin an oath to the witnesses; but, where a reference is made after action commenced, it is usual to swear the witnesses before a judge of the court in which the action is brought; and they may examine the parties themselves.

On a submission of all *matters in difference* between copartners, the arbitrators may dissolve the copartnership. 1 *Black.* 475.

It is required that the award be *mutual*, and appoint something advantageous to either party; for, an award on one side only is not good. The principal requisite, however, to form that mutuality is nothing more than that the thing awarded to be done should be a final discharge and satisfaction for all debts and claims, by the party in whose favour the award is made, against the other for the matters submitted; and means the same thing as when we say the award shall be final. 1 *Lord Raym.* 246.

It must also be *possible* and *lawful*; and, therefore, if it be awarded that money shall be paid to an infant, and that he shall make a release, it is void. And the party is discharged, if he be prevented by the act of God; as if it be to deliver a horse before such a day, and he dies before that day. 1 *Sid.* 12: 2 *Vent.* 243: 12 *Mod.* 585.

So, an award that one party shall be bound with such sureties as the other shall approve is void; for, it may be impossible to force the approbation of the other party. 3 *Mod.* 272, 3. But, in this case, the party should enter into a bond himself, and tender it to the other.

It has been said, that an award that one shall pay for the writings of award, or the reckoning in the house, where the award was made, is void; for, that such things are plainly out of the submission. But it is since held, that the arbitrators may award costs, without any express authority for that purpose. 2 *T. Rep.* 645: 1 *Pul. and Bosan.* 93.

It must also be *certain* and *final*: upon which ground it has been resolved, that an award, that one shall beg another's pardon before such a particular person, is well enough: but, if it be that he shall beg pardon in such a manner and place as the other party shall appoint, it is not good; for, the arbitrators are to *determine*, and not to make the party his own judge. 1 *Salk.* 71. Nor can they regularly reserve any thing for their future judgement, when the time allowed them is expired. *Cro. Jac.* 585. So an award,
that

that one shall give security to the other for payment of a sum of money, is void for uncertainty; not shewing what sort of security he should give. 5 Co. 77, b. 78, a.: 1 Sid. 59: Lutw. 51: Comb. 456: Cro. Jac. 314.

On the construction of *certainty* and *uncertainty* the cases are multifarious; and they principally depend on such circumstances as are peculiar to each case, and very seldom form any general precedent. The rule, therefore, serves better to regulate the conduct of arbitrators than the numerous *exceptions*. As it is the interest of the party, against whom the award is made, to be ingenious in finding out objections, an award cannot be too particular or concise in laying down what is to be done by the parties, and the manner, time, and place, of doing it. Though the two latter have been deemed immaterial, (*Str.* 905,) yet it is safest to specify them. *Toml. Dist. v. Award.*

It is a general rule in equity, that, when it appears that one of the arbitrators is any ways *interested*, the award is to be set aside. 2 *Vern.* 251.

And it is considered as the strongest argument of *partiality* that they received from either of the parties a considerable sum of money, or other thing, which might be a temptation to act corruptly. But the sum or present must be so exorbitant as to incline the court to believe it biased the judgement. But, where the arbitrators take money from one of the parties singly, whether for charges, trouble, or any thing else, before making their award, even if the arbitrators themselves demand it, and, one refusing, the other pays the whole, it vitiates the award. 2 *Vern.* 101, 251: 3 *P. Wms.* 262: 1 *Vez.* 317.

Awards are, of late years, considered with greater latitude and less strictness than formerly; and the court will not now enter into all the merits of the matter referred, but only take into consideration such legal objections as appear upon the face of the award, and such as go to the corruption,

tion, partiality, or other misbehaviour of the arbitrators. 1 Burr. 277: 2 Atk. 504 (519).

Where the arbitrators cannot make the award within the time limited by the rule of court or order of *nisi prius*, a rule may be obtained by consent for enlarging it; but, where an arbitration-bond limits the time for making an award, and the parties mutually consent to enlarge it, the action on the bond for a breach is lost. So that, in such cases, a new bond should be executed. But the time may be enlarged by an indorsement on the bond, adding that *this* shall be made a rule of court, which will entitle the party grieved to an attachment. 8 T. Rep. 87.

As to awards where no bonds are exchanged, *see v. EVIDENCE.*

It may be proper to observe here, by way of caution, that the court will not grant an attachment against a peer for not paying money awarded. 7 T. Rep. 171. Nor against a member of parliament. *Id.* 448.

The courts set aside awards for corruption, interest, partiality, want of understanding in the arbitrators, where they have been deceived, or evidently mistaken in a matter of fact. 2 Vern. 705: 1 Atk. 77 (64): 2 T. Rep. 781: 3 Atk. 529 (496): *Ambl.* 245.

Arbitrators, who have a power of choosing an umpire, may choose one the instant (or even *before*) they begin to take the matters referred into consideration, or at any time before the period is expired, provided there be time to make the umpirage. And the nomination of an umpire, before they proceed, is so far from putting an end to their authority, that it is *esteemed* the fairest and best way of choosing an umpire. 2 T. Rep. 645: 3 Kcb. 387: *Freem.* 378: 2 Mod. 169: 3 Lev. 263: 2 Vent. 113: 1 L. Raym. 222: 1 Black. 463.

It was formerly held, that an umpire cannot proceed upon the report of the arbitrators, but must hear the whole matter anew; but there seems no good reason for this determination;

mination ; and they are now considered as justified in so doing, unless required to re-examine the witnesses, 4 *T. Rep.* 589.

As the award must accord with the submission, it must not extend to any *matter* or *thing* not comprehended in the submission. Thus, if the submission be of a particular matter in dispute, while there are others in controversy between the parties, an award which extends to any of these is so far void, 2 *Mod.* 309.

The law has secured each of the parties against the *voluntary* procrastination of the other, by permitting the arbitrator on due notice given to proceed without his attendance, 9 *Mod.* 63 : 2 *Eq. Abr.* 92, c. 3. Or the willing party may press his opponent by rule of court to attend the arbitrator ; who, on failure, may make his award without such attendance. *Hetley v. Hetley in Scac. Mich.* 1789.

4. *What is to be done after the award.*

If the submission be, so as the award be *ready to be delivered* to the parties, or *to such of them as shall desire the same*, the parties themselves must take notice of the award ; but if the words are, so that the award be *delivered* to each party *by such a day*, then it must be delivered to each party respectively. 5 *Co.* 103 : *Cro. El.* 885 : *Mo.* 642 : *Read. Arb. Wood. b. A, c. 3.*

But, though the words of the submission may be such as will oblige the parties to take notice of the award at their peril, yet, if the arbitrators award that one of the parties shall do an act which depends upon another, first to be done by the other party, he must have notice of it ; at least the party, who would take advantage of it, must shew that he has done what is necessary on his part. 1 *L. Raym.* 233, 4 : *Rel. Arbit. Z. 6.*

If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it ; and the party, who would take advantage of it, must shew that he has done what was requisite on his part ; but,
if

if a thing is merely ordered to be done in general terms, it shall be done immediately. 2 *Brown*. 311.

If the submission be by rule of court, it is necessary that there be a personal demand of the thing awarded, and the party must make affidavit of such demand before he can have an attachment. 1 *Salk*. 83.

If a sum of money be awarded to one of the parties, and that upon payment thereof they shall give mutual releases; if he, who is to receive the money, refuses it, yet upon a tender and refusal he is as much bound to execute a release as if he had actually received it. 1 *Salk*. 75.

Where the submission is *under the statute*, or by reference *at nisi prius*, the court will, on some occasions, send back the award to be reconsidered; on suggestion that the arbitrator had not sufficient materials before him; and perhaps, too, to rectify any trifling or apparent mistake: but such application must be made, where the submission is under the statute, within the time prescribed by the statute. 2 *T. Rep.* 781.

Where partners by their articles agree to refer all matters in dispute to arbitration, an action will nevertheless lie; for, such an agreement does not take away the jurisdiction of the courts. 2 *Ves. sen.* 129; 8 *T. Rep.* 139.

By *Stat.* 9 and 10, W. III. c. 15, a motion to set aside an award under a submission by bond must be made *before* the last day of the next term, after publishing the award. 2 *T. Rep.* 781: *Cowp.* 23. But this does not extend to an award made in pursuance of an order of *nisi prius*. 1 *Str.* 301: 2 *Burr.* 701. — And although a motion, to set aside an award for *extrinsic* matters, must be made within the time limited by the act; yet, an application for an attachment for not performing an award may be resisted at any time for defects appearing *upon the face of the award* itself. 7 *T. Rep.* 73.

And

And if an award be made on an improper stamp, and no application be made to enforce the award, the court will not hear any motion to set it aside; for, the award may be rendered a valid instrument, by paying the penalty and procuring the proper stamp: and the award in such a state may be considered as a nullity, and so not the object of any motion at all. 7 *T. Rep.* 95.

ARREST.

The arrest of a debtor, to enforce payment of a demand, should not be rashly or inconsiderately decided upon, even though the debt may be considerable. There are some cases and circumstances which make the service of a common process, or opening a negotiation by means of a faithful attorney, the most eligible course, as the most likely to secure the payment of the money. And, in case of an arrest, it is always advisable for the plaintiff or his attorney to be at hand, when the arrest is made, to consider of any proposals which may be offered, before the debtor becomes desperate by being publicly exposed, and to prevent other creditors from taking the alarm.

In order to recover money which may be owing, very much depends upon activity and discreet management. The almost-universal practice is, to put the warrant into the hands of a sheriff's officer, by whom this first part of the business is wholly conducted. The consequences of this practice are manifest. The officer, as it is very natural for him to do, looks to himself, and the ultimatum of his hope and expectation is a bail-bond. Whereas, were the attorney or his client at hand at the time, it is very probable that some plan might be adopted, which would secure the payment of the demand, and in some instances save the defendant from ruin. To encourage this method of proceeding, there needs nothing but that the attorney should take care to secure the officer from any loss, which he has
always

always found a liberal and sensible client willingly acquiesce in.

An officer cannot on an arrest in a civil action break open *outer* doors; but, having entered the house peaceably, if the person is locked or fastened in an *inner* room, he may, after due notice and refusal, lawfully break open the door to make the arrest. *Cowp.* 1. He may break open the inner door, though it be the apartment of a lodger, if the owner himself occupies part of the house. But, if the whole house be let in lodgings, as each lodging is then considered as a dwelling-house, in which burglary may be stated to have been committed, so probably the door of each apartment would be considered as an outer door, which could not be legally broken open to execute an arrest. *Cowp.* 2. So where there are distinct apartments in an open gallery. 1 *Espin. Rep.* 99.

If a man unlawfully arrests another, as for £10 or upwards, when the debt is really under £10, an action for maliciously holding him to bail will lie.

Soldiers, and seamen on-board his majesty's ships, cannot be arrested or taken in execution for any debt less than £20; but this extends not to any criminal matter. 1 *Geo. II. c.* 14: 31 *Geo. III. c.* 13.

Arrests may be made in special cases for assaults and other matters, as well as for debts contracted; but, in these cases, an affidavit of the cause of action must be made, and a judge's order obtained. *Scheif.* 76.

If a man voluntarily permits one to escape whom he has arrested, on a mesne-process, he may retake him before the return of the writ. 2 *T. Rep.* 172.

It is not necessary that the party should be touched to constitute an arrest. If there is an acquiescence, it is an arrest in law, up to the extreme consequences of it. *Lord Kenyon, The King v. Charter, Trin.* 1798. — A bailiff ought to shew at whose suit the writ is, out of what court it issues,
and

and for what cause, when the party submits to the arrest. 9 *Rep.* 68. And if the arrest be made by the follower, the bailiff ought to be so near as to be considered as acting in it. *Cowp.* 65.

By the *Stat.* 32, Geo. II. c. 28, an officer shall not carry his prisoner to any tavern, &c. without his consent, nor charge him with any liquor but such as he shall freely call for, nor demand for caption or attendance any other than his legal fee, nor exact any gratuity-money, nor carry his prisoner to jail within twenty-four hours after his arrest, unless the prisoner refuses to go to some safe house (except his own) of his own choosing; nor shall any officer take for the diet, lodging, or expenses, of his prisoner, more than shall be allowed by an order of sessions. Bailiffs are to shew a copy of the act to prisoners, and to permit perusal thereof; and the prisoner to send for his own victuals, bedding, &c.

The fee now allowed for arrests on mesne-process in town is 10s. 6d.; in the country, £1 1s. and 1s. per mile. *Impey's Sheriff*, 122.

By *Stat.* 7, Anne, c. 12, an ambassador or public minister, or his domestic servants, registered in the secretary of state's office, and thence transmitted to the sheriff's office of London and Middlesex, are not to be arrested. But they must be such as are really and *bond fide* retained and registered in that capacity. 1 *Wils.* 20, 78, 9: 3 *Wils.* 33: 2 *Str.* 797: 2 *L. Raym.* 1524: 3 *Burr.* 1676.

A secretary of a foreign minister, though his name be not registered at the office of the secretary of state, is privileged. 3 *T. Rep.* 79.

The king's servants are privileged from arrest; and, if taken in execution, the court will discharge them on motion. 1 *L. Raym.* 152: 8 *Mod.* 12: 5 *T. Rep.* 686.

So are clerks, attorneys, and all other persons attending the courts of justice. 4 *Inst.* 72: 2 *Inst.* 551: 12 *Mod.* 163.

The

The following persons are also exempted: clergymen performing divine service, and not merely staying in the church with a fraudulent design. *Stat.* 50, *Edw.* III. c. 5: 1 *Rich.* II. c. 16. Suitors. *Bro. Priv.* 57. Witnesses subpoenaed, and other persons necessarily attending any court of record upon business. *Sir T. Raym.* 101: 1 *Vent.* 11. — *Rules in chancery*, 217: 3 *Inst.* 141. — A bankrupt coming to surrender, or within forty-two days after his surrender. *Stat.* 5, *Geo.* II. c. 30, *sect.* 5: and *see Coup.* 156. — Witnesses properly summoned before commissioners of bankrupts, or others, commissioners under the great seal. 1 *Atk.* 54. But not creditors coming to prove their debts, 4 *T. Rep.* 377. — Heirs, executors, or administrators. *R. M.* 1654. Except on personal contracts by themselves. 1 *T. Rep.* 716. Or in cases of *devastavit*. 1 *Salk.* 98. — Sailors or volunteer soldiers, unless the debt is £20. *Stat.* 1, *Geo.* II. c. 14, *sect.* 15: 31 *Geo.* III. c. 13, *sect.* 65: See *Barnes*, 114: 1 *Str.* 2, 7: 1 *Black. Rep.* 29, 30. — Officers of courts are allowed these privileges only where they sue or are sued in their own right; not if as executors or administrators, nor in joint actions. *Hob.* 177: *Dier*, 24, p. 150: 2 *Sid.* 157: *Latch*, 199: *Godb.* 10: 2 *Rel. Abr.* 274.

English and Scotch peers, but not Irish or other foreign peers, are privileged from arrests. So is a peeress by birth or marriage, and members of parliament. But it does not extend to peeresses by marriage if they afterwards intermarry with commoners. 1 *Inst.* 131: 2 *Inst.* 50: 2 *Str.* 990: *Co. Lit.* 16: 6 *Co.* 53: *Dier*, 79.

The privilege of the servants of peers was taken away by *Stat.* 10, *Geo.* III. c. 50, *sect.* 2.

As for arrests in cases of *felony*, it may in general be observed, that any person may, without an express warrant, arrest a man, whom he sees on the point of committing treason or felony. 2 *Hawk. P. C.* 77.

A constable has no power to arrest a man for an affray done out of his own view without a warrant, but a justice of peace may. 1 *Hawk.* 137.

When a felony has been actually committed, a private person, or peace-officer, may arrest a person of whom there may be reasonable grounds to believe that he is the offender. Where an arrest has been made of an innocent person, the legality of it depends on the following questions: Was the arrest *bonâ fide*? Was it done fairly and in pursuit of an offender? Or by design, or malice, and ill-will? *Hawk. P. C. c. 11, sect. 15, n.: Doug.* 345.

ARTIFICERS.

A stranger-artificer in London, &c. shall not keep above two stranger-servants, but he may have as many English as he can get. 21 H. VIII. c. 16.

Persons, contracting with artificers in wool, iron, steel, brass, or other metal, &c. to go to a foreign country, shall be fined, not exceeding £100, and imprisoned three months; and English artificers, going abroad, not returning in six months after warning given by our ambassadors, &c. shall be disabled to hold lands by descent or devise, be incapable to take any legacy, &c. and deemed aliens. 5 Geo. I. c. 27.

By 23 Geo. II. c. 13, persons, convicted of seducing artificers in the manufactories of Great Britain or Ireland out of the dominions of the crown of Great Britain, shall forfeit £500, and be imprisoned twelve months; for the second offence, £1000, and be imprisoned two years. *See also,* 14 Geo. III. c. 71: 15 Geo. III. c. 5: 21 Geo. III. c. 37: 22 Geo. III. c. 60: 25 Geo. III. c. 67: and 26 Geo. III. c. 89. By which statutes heavy penalties are inflicted on masters of ships assisting in such seduction.

A tailor or other artificer may detain clothes till payment is made for his labour. 1 *L. Raym.* 393.

ASSAULT.

Whatever action a man does, which shews a malicious intention to do a corporal hurt to another, is an assault in law: as seriously and purposely aiming a blow, presenting a gun, pointing a pitchfork, casting stones, menacing with a drawn sword, &c. 2 *Roll. Abr.* 545: *Bro. Tresf.* 236, 336. — But, to make an assault, the intention of the party must co-operate with the act. — No words of provocation can amount to an assault. 1 *Hawk.* 134.

Where none are present but the two parties, an indictment is the safest method of proceeding, on account of the difficulty which would otherwise attend the proof. 1 *Hawk.* 65.

ASSETS. — See *Debtor and Creditor.*

Assets are real or personal: of real, lands which come to the heir by descent are assets; but lands which come to him by purchase are not; for, if the ancestor by any deed shall bind himself *and his heirs* and dieth, this covenant shall be binding on the heir, so far as he has any estate vested in him (or in another in trust for him) by descent; whether the possession continues in him, or he aliens it before the action be brought; and he is answerable no farther. 29 *Car. II. c. 3*: 1 *P. Wms.* 777. — *Note.* The *Stat. 3 and 4 Will. and Mary, c. 14*, makes devisees as well as heirs liable to bond-debts.

Copyholds of inheritance shall not be assets to charge the heir.

A bond is not assets till the money be recovered. 3 *Leon. c. 77*: *Dal.* 89, *pl.* 4.

Reversions

Reversions expectant on an estate tail are not assets, or of any account in law, because they may be cut off by common recovery ; but it is otherwise of a reversion on an estate for life or years. *Toml. Dist. v. Reversion.*

ASSIGNMENT.

A mortgagee of a term of years cannot be sued as assignee of that term by the original landlord, till he has actual possession. *Doug.* 455. — So of a mere assignee.

An assignee of a term may assign, even to a beggar, and thereby get rid of his subsequent rent, and the covenants which run with the land, and the lessor has no relief either at law or in equity. And if any inconvenience arises to the landlord, it arises from his own folly, to take the first assignee for his tenant. And the lessor is not without remedy ; for, though he cannot bring an action of debt against the original lessee, he may bring action of covenant against him, or distrain. *Carth.* 177 : *Buller's N. P.* 159.

An assignee is subject to the covenants in the original lease ; but an under-lessee is not. And it is said that the termor, who grants an under-lease, may distrain ; but that, when he assigns his whole interest, he cannot, because he has no reversion. 1 *Lill. Abr.* 99.

An under-lease is not an assignment to the effect of working a forfeiture, under a proviso not to assign. 1 *Doug.* 57, 184.

Where the whole term is made over by the lessee, although in the deed by which it is done the rent and a power of distress for nonpayment are reserved to him, and not to the original lessor, this is an assignment and not an under-lease. *Id.* 187.

If, from any defect in an assignment, it is not good as such, it shall against the party assigning be good as an under-lease. *Id.* 188.

If a lessee assigns his term and die, his executors shall not be charged for rent due after his death. *Noy's Max.* 91 (71).

If the executors or administrators of a lessee do assign over their interest; neither doth an action of debt lie against them for rent due after the assignment. *Ibid.*

It is a general rule, that an assignee is liable for the breach of all such covenants as run with the land; but not for such as are collateral to it. *Carth.* 177.

Although in the covenant of the lessee the word "*assigns*" be wanted, yet any assignee, by the acceptance of possession, makes himself liable to all covenants concerning the land; but not to collateral covenants: and covenants for reparations of and erecting walls and buildings, on the premises demised, are covenants inherent to the land, with which an assignee shall be charged without special words. *Moore*, 159, pl. 300: 5 *Co.* 16, b.

Where a lease is made on condition to be void if assigned without consent, an assignment by the sheriff under an execution is good; and so, it is said, are all subsequent assignments. But, if a judgement be confessed purposely, it is a fraud on the landlord and void, and he may recover of the assignee of the sheriff. 8 *T. Rep.* 57.

It has been solemnly determined, in the Court of King's Bench, that, where there is a proviso not to let, &c. a lessee's administrator cannot underlet without incurring a forfeiture. 2 *T. Rep.* 425. But this does not seem to accord with the doctrine laid down by *Lord Thurlow*, that executors may dispose of a lease for years as assets, notwithstanding a proviso or covenant that the lessee shall not assign. 1 *Ves. jun.* 294.

A covenant or condition not to assign is determined by a license to alien, and the alienee under such license may alien to whom he pleases. *Cro. El.* 815, 816: 4 *Rep.* 119, b.: 2 *Roll. Abr.* 472: 8 *Cro. Car.* 398: 4 *Leon.* 58: 2 *Bulst.*
290,

290, 1, 4: 4 *Leon.* 58: See 3 *Wood's Conveyan.* 590, where many cases are brought together on this subject.

It appears that a *possibility* (whether in real or personal estate) is transmissible, assignable, devisable, and descendable. 2 *Atk.* 616: 1 *H. Black.* 30: 3 *T. Rep.* 88: *Fearne's Con. Rem.* 444. So also springing, contingent, executory uses. 1 *H. Black.* 30.

The pay or half-pay of a naval or military officer cannot be assigned before it is due. 4 *T. Rep.* 248, 258: 3 *T. Rep.* 681.

To prevent pensions being assigned, the office will pay none but the original pensioner.

An assignment of a contract or chose in action need not be by deed. 4 *T. Rep.* 690. And an assignment of a term may be by a note in writing, without either seal, delivery, or stamps. 5 *Burr.* 2827. If an assignment be made of a sum of money owing or payable to the assignor, notice of the assignment should be immediately given to the party liable to pay it,

ASSURANCE.

Affurances upon lives are, when one party, in consideration of a certain sum, either paid in hand or to be paid annually by another party, assures to that other party a much larger sum, after the decease of the person upon whose life the assurance is made; and like annuities for life are grounded on the expectancy of the continuance of life; but with this difference, that, in the case of an annuity for a single life, it must always be uncertain and precarious; yet, in the case of a society consisting of a great many lives, their average continuance is reducible to something like a probable certainty; the length of some and shortness of others combining to produce the effect.

This mode of assurance is chiefly useful to persons, the support of whose families depends upon their own continuance in life. They are also made use of for raising money, making settlements, &c. by assigning the policy.

Assurances are also made on the lives of others, and are eligible when persons depend on an annuity or other income, determinable upon those other persons' lives.

These contracts have been found to be attended with so many advantages, to persons whose incomes might otherwise determine with their own lives or those of others, that a society obtained a charter from Queen Anne for the purpose of granting such annuities, and still subsists under the name of *The Amicable Society for a perpetual Assurance-Office*. A similar society is established, by deed enrolled in the Court of King's Bench at *Westminster*, called *A Society for Equitable Assurances on Lives and Survivorships*. The two companies of *The Royal Exchange* and *London Assurance* also obtained a charter for the same purpose; and, by *Stat. 33 Geo. III. c. 14*, the two companies of *The Royal Exchange Assurance* for insuring of ships and for insuring houses, &c. against fire, are authorized to grant annuities for lives or on survivorship; and are incorporated for that purpose by the name of *The Royal Exchange Assurance Annuity-Company*. Private underwriters may also enter into policies of this nature, if an insurer chooses to trust to their single security.

By *Stat. 14 Geo. III. c. 48, sect. 1*, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person, for whose use, benefit, or on whose account, such policies should be made, shall have no interest, or by way of gaming or wagering; and every such insurance shall be void. And, in all cases where the insured has an interest in the life or lives, event or events, insured, no greater sum shall

shall be recovered than the amount or value of the interest of the insured, in such life or lives, or other event or events. *See* 3.

The holder of a note for money won at play has not an insurable interest in the life of the maker of the note. *Parke*, 432. But a *bonâ-fide* creditor has an insurable interest in the life of his debtor. *Ibid.*: *Peake's N. P.* 154.

In a life-insurance, the insurer undertakes to answer for all those accidents to which the life of man is exposed, except suicide, or death by the hands of justice. *Ibid.*

The death must happen within the time limited in the policy, otherwise the insurers are discharged. *Id.* 433.

If a man receive a mortal wound during the existence of the policy, but does not in fact die till after, the insurers are not liable. *Ib.*

But if a man, whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances. *Ibid.*

In a life-insurance it has been held that, if the insured becomes a bankrupt before the loss happens, the person interested may prove his debt under the commission as if the loss had happened before it issued. *Id.* 434, 435: *Doug.* 166, n.

A policy was made for one year from the day of the date thereof; the policy was dated the third of September, 1697, the person died on the third of September, 1698, about ten o'clock in the morning, and the insurer was held liable. *Id.* 436: 2 *Salk.* 625: 1 *L. Raym.* 480, S. C.

It is now usual to insert, in the policy, *the first and last days included.* *Parke*, 436.

Fraud or falsehood equally vitiates policies on lives, as in case of marine insurances. *Prec. Chanc.* 20: 2 *Vern.* 206.

Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health; for, it can never mean that he is free from the seeds of disorders. *Ibid.*: 1 *Black. Rep.* 312.

If the person, whose life is insured, labours under any particular infirmity, if it be proved by medical men that, in their judgement, it did not at all contribute to his death, the warranty of health is fully complied with, and the insurer liable. *Parke*, 438.

If the person, whose life is insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. *Id.* 440: *Doug.* 758: *Cowp.* 669.

These insurances, when a loss happens upon them, must be paid according to the tenor of the agreement, in the *full sum* insured, as this sort of policy, from the nature of it, does not admit of the distinction between total and partial losses. *Lex Merc. Rod.* 4th edition.

Some writers describe an insurance upon life to be a contract, by which the underwriter, for a certain sum, proportioned to the age, health, and profession, of the person whose life is the object of the insurance, engages that that person shall not die within the time limited in the policy; or, if he do, that he will pay a sum of money to him, in whose favour the policy was granted.

ATTACHMENT. — See *Foreign Attachment*.

ATTORNEY. — See *Authority*.

ATTORNEY-AT-LAW.

Payment to the attorney is payment to the principal. *Doug.* 623.

An

An attorney has a lien on the money recovered by his client for his bill of costs. If it came to his hands, he may retain to the amount of his bill. He may stop it in transitu, if he can lay hold of it. If he will apply to the court, they will prevent its being paid over till his demand be settled. If the attorney give notice to the defendant not to pay till his bill be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which had been assigned after notice. 2 *Doug.* 238.

An attorney is not liable to be sued in the Middlesex Court of Conscience. 1 *Doug.* 382: 1 *Black. Rep.* 8.

A bill may be filed against an attorney in the vacation. 5 *T. Rep.* 325.

AUCTION. — See *Deposit.*

On sales by auction, where the auctioneer puts down the name of the buyer and price, &c. in his book, it is sufficient to take it out of the statute of frauds, so that no earnest or note in writing between the parties is required. 3 *Burr.* 1921: 1 *Black.* 599, 600, 601. See *CONTRACTS.*

Where a party purchases several lots of houses at an auction, it shall be deemed an entire contract; and, if the seller fails in making a title to any of them, the buyer may rescind the whole contract. *Id.* 150.

A bidder may revoke his bidding before the hammer is down. 3 *T. Rep.* 148.

A creditor, to a person whose goods are sold by auction, cannot purchase at the sale, and set off his debt against the amount of his purchase. In such case, the auctioneer is entitled to an action. 1 *H. Black.* 8.

An action at law will not lie to recover money due for puffing at an auction.

Auctioneers

Auctioneers are bound to take such due care of goods committed to them as they would do of their own; so that, for losses arising from misfortune or unavoidable accident, they are not answerable. 1 *Espin. Rep.* 339. See BAILMENT.

The defendant bought an estate at auction, which, in the printed particulars of sale, was stated to be free from all incumbrances; but, there being a charge of £17 per annum on the estate, he refused to take it, and an action was brought. On the trial the plaintiff was nonsuited, *Lord Loughborough* refusing to admit evidence, contrary to the printed particulars, that the auctioneer declared publicly at the sale that the estate was thus encumbered, proof having been offered that the defendant had *express personal* information given to himself of the incumbrance: and, upon a motion for a new trial, the court agreed in his lordship's opinion. 1 *H. Black.* 289.

Where a person sends an article to an auction, which advertises to sell to the best bidder, with orders *not to* have it sold under such a price, an action will not lie against the auctioneer if he sells it at a price less than that so mentioned, if he sells it for the highest price bid, as such dealings are a fraud on buyers; but it is otherwise had he ordered it *not to be set up* under such a price, which he might have done; or he may declare in the conditions of sale that he himself will bid once. *Cowp.* 395.

The practice of puffing, as it is called, at auctions was, in the case of *Bexwell v. Christie*, *Cowp.* 395, considered as illegal; but the legislature, having since that case enacted that property put up to sale by auction shall, upon the knocking down of the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shewn to have been bought in by the owner himself, or by some person by him authorized, seems indirectly to have given a sanction to this practice.

practice. 2 *Bro. Ch. R.* 326 : 28 Geo. III. c. 37, sect. 20 :
 1 *Fonblanque, Eq.* 416. But it has been since determined,
 that, if the owner of goods or an estate, put up to sale at
 an auction, employs puffers to bid for him without declaring
 it, it is a fraud on the real bidders ; and the highest bidder
 cannot be compelled to complete the contract. And that
 the *Stat.* 28 Geo. III. c. 37, makes no difference. *Howard*
v. Castle, E. 36, Geo. III. 6 *T. Rep.* 642.

Where the defendant, who was an auctioneer, sold to
 the plaintiff an interest in land, and the plaintiff paid him
 a deposit in respect of such purchase ; but afterwards, upon
 the discovery of an objection to the title, and also of cer-
 tain circumstances which ought to have been disclosed at the
 time of the bidding, declined going on with the contract,
 and brought an action against the auctioneer to recover
 back the deposit, which he refused to return ; the court
 declared, that the action against the auctioneer lay,
 and said, " The money had not been paid over to the prin-
 " cipal ; but, if it had been so, yet the objection appeared
 " to have been made before it either was or ought to have
 " been paid over ; for, the auctioneer is a stake-holder, a
 " mere depository, and ought not to part with a deposit,
 " till such time as the sale be completed and finished, and
 " it appear in the event to whom it properly belongs."
 5 *Burr.* 2639.

But, upon a contract for a purchase, if the title proves
 bad, and the vender is, without fraud, incapable of making
 a good one, the purchaser is not entitled to any damages for
 the fancied goodness of the bargain, which he may suppose
 he has lost. 2 *Black.* 1078.

AUTHORITY.

If a third person treats for one that is absent without his
 order, but undertakes for his consent, the absent party does
 not enter into the covenant till he ratifies it ; and, if he
 does

does not ratify it, the person who undertook for his consent only shall be bound. As if A and B, insolvents, apply to a scrivener, who had procured £200 for A upon their bond to C and D to compromise the debt; and the scrivener tells them, that C and D would stand to any thing that he did, and accordingly compounds it with them; yet A and B shall pay C and D their whole money, they not being any way privy to the agreement; and the scrivener shall repay them, and indemnify them according to the agreement, though he acted only as an agent. 2 *Vern.* 127. So, if A, by writing, agrees with B and C to pave the streets in a parish, and they, in behalf of the parish, agree to pay him for it, and this writing is lodged in the hands of B, if A paves the streets he must have relief against the undertakers, and the undertakers must take their remedy over against the parish: and, more especially in this case, the written agreement, which is his evidence, being in the hands of one of them. *Hardres*, 205: 2 *Vern.* 421. — On the other side, where a man acts in execution of the authority given him by another, either expressly or impliedly, then it is by relation the act of that other, and he acquires no right nor brings any obligation upon himself. Yet, if a verdict is obtained against an agent or trustee, equity will not relieve against such verdict, but will decree that he shall be re-imburfed by his principal, and stand in the place of his creditor. 1 *Fonblan. Eq.* 285.

If he, who undertakes for another, has no authority, then it is a fraud, and the undertaker ought himself to be liable; but, where there is such an authority given, it is only acting for another; like the case of a factor or broker acting for their principals, who were never held to be liable in their own capacities. But, where one undertakes for another under an authority, he must, in order to protect himself from being personally bound by such undertaking, strictly pursue his authority. 3 *P. Wms.* 279.

If a man hath a bare authority, joined with a confidence, without interest, this authority cannot be executed by attorney; and, if I desire that my executor shall sell my land, he cannot sell by attorney; for, that would make attorney upon attorney, which the law will in no wise permit. And, though a man have an authority joined with an interest, yet, if the authority be warranted by special custom only, it cannot be executed by attorney; and therefore, if there be a special custom, that a copyholder out of court may surrender into the hands of the lord by the acceptance of two customary tenants, such surrender must be done in person. But, wherever there is a general authority, coupled with an interest, that authority may be executed by attorney. *Coke's complete Copyholder*, 92, 93. And, if the attorney executes it contrary to the effect of his authority, this is utterly void; but if he executeth his authority, and withal goeth beyond the limits of his warrant, it is void for that part only wherein he exceedeth his authority. *Id.* 111.

A man may make his wife attorney. *Fitz. N. B.* 27.

Where one is delegated to act for another, he must not do it in his own name only, but in the name of the person who gave the authority. 9 *Rep.* 76. So, on the execution of a deed, the agent should sign in the name of the principal. 6 *T. Rep.* 176.

Where deeds are delivered to the party constituted, they should be delivered to the use of the party constituting. 2 *Bl.* 306.

A person is not bound to accept of a conveyance, executed under a power of attorney. 1 *Espin. Rep.* 115.

It is a rule, that every authority shall be countermandable, and shall determine by the death of him that gives it.

But, when an interest is coupled with an authority, then it cannot be countermanded or determined. *And.* 1: *Dier*, 190.

BAIL.

BAIL.

An agreement in writing to put in good bail for a person arrested, on a mesne-process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the sheriff's bailiff, in consideration of his discharging the party arrested, is void by the *Stat.* 23 H. VI. c. 9. But the undertaking of an attorney for the appearance of a defendant is not within the statute, if given to the plaintiff in the action, and not to the sheriff. 1 *T. Rep.* 418.

BAILMENT. — See *Hiring and Borrowing.*

Bailment is a delivery of goods in trust, either expressed or implied, that they shall be re-delivered, as soon as the time or use for which they were bailed shall have elapsed or be performed.

There are six sorts of bailments, which lay a care and obligation on the party to whom goods are delivered; and which consequently subject him to an action if he misbehave in the trust reposed in him. 2 *L. Raym.* 909: *Bull. N. P.* 72.

1. A bare and naked bailment, to keep for the use of the bailor, which is called *depositum*; and such bailee is not chargeable for a common neglect, but it must be a gross one to make him liable. 2 *Str.* 1099.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called *accommodatium*, and is a lending *gratis*; in which case, the borrower is strictly bound to keep them; for, if he be guilty of the least neglect, he shall be answerable; but he shall not be charged where there is no default in him.

3. A

3. A delivery of goods for hire, which is called *locatio* or *conductio*; and the hirer is to take all imaginable care, and restore them at the time; which care, if he so use, he shall not be bound.

4. A delivery by way of pledge, which is called *vadium*, and in such goods the pawnee has a special property; and, if the goods will be the worse for using, the pawnee must not use them. See PAWNING.

5. A delivery of goods to be carried for a reward. See CARRIER.

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called *mandatum*; in English, *an acting by commission*. In this case, if there be any neglect in him, he will be answerable; for, his having undertaken a trust is a sufficient consideration; but, if the goods be misused by a third person, in the way, without any neglect of his, he will not be liable, being to have no reward.

Of neglects there are three classes.

1. Gross neglect, which consists in the *omission* of that care, which even inattentive and thoughtless men never fail to take of their own property. This fault is justly held a violation of *good faith*.

2. Ordinary neglect, which is the *want* of that diligence which the generality of mankind use in their own concerns; that is, of *ordinary care*.

3. Slight neglect, which is the *omission* of that care, which very attentive and vigilant persons take of their own goods; or, in other words, of *very exact diligence*.

A person hath such a special property in goods delivered to him to keep, that he may maintain an action against strangers, who take them out of his possession. *Lil. Abr.* 400, 401. See Sir William Jones's *Essay on the Law of Bailments* by Balmanno.

BANK.

BANK.

The funds transferrable at the Bank of England are, at present, the following, viz.

NAME.	TRANSFER-DAYS.	DIV. DUE.
5 per Cent. Navy-Annuities	Monday, Wednesday, and Friday	Jan. 5 and July 5,
3 per Cent. Consols	Tuesday, Wednesday, Thursday, and Friday	
3 per Cent. 1726	Tuesday and Thursday	
Bank-Stock	Tuesday, Thursday, and Friday	April 5 and Oct. 10.
5 per Cent. 1797	the same	
4 per Cent. Consols	Tuesday, Thursday, and Saturday	
3 per Cent. Reduced	Tuesday, Wednesday, Thursday, and Friday	May 1 and Nov. 1. Mar. 25 & Sept. 25.
Long Annuities	Monday, Wednesday, and Saturday	
Short Annuities	the same	
3 per Cent. Imperial Annuities	Monday, Wednesday, and Friday	Mar. 25 & Sept. 25.
Imperial Annuities, 25 years	Tuesday, Thursday, and Saturday	
Irish 5 per Cent.	the same	
Irish Annuities	the same	

Transferrable

Transferrable at the South-Sea-House.

NAMZ.	TRANSFER-DAYS.	DIV. DUE.
South-Sea Stock	Monday, Wednesday, and Friday	Jan. 5
3 per Cent. South-Sea Annuities	Tuesday, Thursday, and Saturday	and
3 per Cent. 1751	Tuesday and Thursday	July 5.
3 per Cent. Old South-Sea Annuities	Monday, Wednesday, and Friday	{ Apr. 5 and
		{ Oct. 10.

Transferrable at the India-House.

India-Stock	Tuesday, Thursday, and Saturday	{ Jan. 5 and
		{ July 5.

Bill and Bond Securities.

Exchequer-Bills.	Ordinance-Debentures.
Navy-Bills.	India Bonds.
Victualling-Bills.	

Of the above, the government funds are preferable to those of any trading company, for this reason among others, that the causes by which the stocks of government may be depressed are such as are open and soon known, and opportunities are given to proprietors to sell out in the first instance with very little loss; whereas the transactions of trading companies are more hidden; and, when events of importance happen to them, there may be a sudden fall of 15, 20, or even 30 per cent. immediately on the events being discovered.

The better to understand the price of stocks, observe, that $\frac{1}{16}$ is 1s. 3d.: $\frac{1}{8}$ is 2s. 6d.: $\frac{1}{4}$ is 3s. 9d.: $\frac{1}{2}$ is 5s.: $\frac{3}{8}$ is 6s. 3d.: $\frac{1}{2}$ is 7s. 6d.: $\frac{7}{8}$ is 8s. 9d.: $\frac{1}{2}$ is 10s.: $\frac{9}{16}$ is 11s. 3d.: $\frac{5}{8}$ is 12s. 6d.: $\frac{11}{16}$ is 13s. 9d.: $\frac{3}{4}$ is 15s.: $\frac{13}{16}$ is 16s. 3d.: $\frac{7}{8}$ is 17s. 6d.: $\frac{15}{16}$ is 18s. 9d. — Thus, $60\frac{5}{16}$ means £60 6s. 3d.

Dividends at the Bank are payable from nine till eleven o'clock, and from one till three. — The payment on the 3 per Cent. Consols is from nine to three o'clock.

Dividends at the India-House are payable from nine till two o'clock; except on Saturdays, when the hours are from nine till twelve o'clock.

Dividends at the South-Sea-House are payable from nine till twelve o'clock.

The brokerage on the government Perpetual Annuities is 2s. 6d. per cent.; on the Terminable Annuities, 2s. 6d. per cent. on the sum laid out; on India bonds, 1s. each; on lottery-tickets, 6d. each.

Transfers of stock may not only be made on non-transfer-days, upon paying half-a-crown, but also after transfer-hours; but it is sufficient to save this expense if, in the last instance, the transfer-ticket can be delivered in before the expiration of the appointed time, although the transfer be not completed till after the time.

If

If you want to discover stock, in which any one has an interest, apply to one of the principal clerks of that particular stock, and he will make the search.

Form of the transfer-ticket.

25th of May, 1793.

John Jones, of Basinghall-street, London, mercer,

£5000 Bank-stock,

To Edward Brown, of Brentford, Esq.

This ticket is given to the transfer-clerk, who enters it in his book, where it is signed by the person transferring, and witnessed by the broker, who also signs to the identity of the person transferring.

Common transfers at the *Bank* are made from the hours of eleven till one o'clock; extra-transfers till three o'clock. At the *India-House*, from eleven till one o'clock. And at the *South-Sea-House*, from twelve till one o'clock.

No business is transacted on Saturdays at the *India-House* after twelve o'clock, nor at the *South-Sea-House* after one o'clock.

Transfers of the same stock cannot be made twice on the same day.

Either the person who transfers his property in the funds, or his broker, must be known to the witnessing-clerk, or some person known must be produced to vouch for the identity of person.

The seller's receipt should be kept by the buyer, as a voucher for transfer, till one dividend has been received.

Stockholders should be particularly exact in the insertion of their names and description, and should keep to their usual mode of writing their names, as a deviation from such rules has oftened occasioned delays.

Government-stock is exempt from any charge in the transfers; but every transfer of stock in any company, society, or corporation, or of any navigation or canal share, is liable to a duty.

A transfer of *Bank Stock*, if under £25, costs 9s.; if above, 12s.

A transfer of *India Stock*, if under £10, costs £1; if above, £1. 4s.

A transfer of *South-Sea Stock*, if under £100, costs 10s.; if above, 12s.

A transfer of *Royal Exchange Assurance Stock*, £1. 4s.

A transfer of *London Assurance Stock*, £1.

Extra-transfers, made at the *Bank*, *India-House*, *Royal Exchange*, and *London Assurance*, cost 2s. 6d. additional. At the *South-Sea-House*, 3s. 6d. additional.

A letter of attorney costs 11s. 6d.

The registering of a will, 2s. 6d.

Dividends on *Bank Stock*, *South-Sea Stock*, and *India Stock*, after acceptance, are payable to a written order; those, however, on *India Stock* must be on stamps.

The dividends on *Bank Stock* are payable when due; but the dividends on the stock of other companies, and on the government-funds, are not payable till several days after.

The space between the shutting and opening of any stock is about six weeks.

At the time of shutting, the dividends due are carried to a separate account, and cannot be transferred with the stock of a proprietor, the warrants being filled up in the name the stock stands in when the books shut, and of course are payable only to him or his attorney.

All letters of attorney to sell or accept stock, or to receive dividends, should be taken out at the respective offices, in order that the description may exactly accord with that in the Bank books.

Letters

Letters of attorney to sell must be deposited in the proper office prior to sale.

Acting personally, after granting a letter of attorney, revokes the power.

Persons having property in the funds should be careful how they give powers of attorney, lest they authorize the party to do that which they never intended. There are four different kinds to be had at the *Bank*, *South-Sea-House*, and *India-House*: 1, for receiving dividends only; 2, for buying only; 3, for selling only; and, 4, for all of these purposes. If it be intended, that the agent should receive dividends only, the proprietor should be careful that the power extends to that and nothing else. For want of this necessary precaution many melancholy events have occurred.

From the circumstance of the *Bank* being a chartered body, property in the funds cannot be attached; relief, however, may, in certain cases, be obtained, by application to the Court of Chancery.

Many difficulties having arisen respecting the transfer of stock under particular circumstances, an act was passed in 36 Geo. III. for removing them. By this act, when stock stands in the names of trustees, who are absent, or out of the jurisdiction of the Courts of Chancery and Exchequer, or have become bankrupts or lunatics, or refuse to transfer the stock vested in them, the court may order the stock to be transferred either into the name of the accountant-general of the Court of Chancery, or that of the deputy-remembrancer of the Exchequer, in trust; or into the names of the parties who are entitled to the same.

If one trustee has become a bankrupt or lunatic, or it is uncertain whether he be living or dead, and the others are willing to act, they may obtain an order authorizing them either to transfer the stock, or to receive and pay over the dividends. When a bankrupt refuses to transfer stock belonging to him, the *Lord Chancellor*, upon petition from

the assignees, may order the stock to be transferred into their names ; and may, likewise, in certain cases, order the transfer of stock, standing in the name of lunatics or their committees.

A provision may be vested in the funds, independent of will or any other deed, for the benefit of a widow, children, or others, by joining the parties' names with the stockholder in a particular account of stock ; which, on the proof of the decease of either, becomes the property of the survivor or survivors.

Any one trustee, after the acceptance of the whole of the trustees, may receive dividends, but cannot sell ; and, if any of the persons, in whose names stock is standing, are dead, the stock cannot be removed by the survivors till they have produced and entered the probate of the deceased's will or letters of administration. And this should be done on a day previous to the attendance for making the transfer.

Probates of wills, which dispose of money in the public funds, must be registered there. An executor will not be suffered to act till that be done, and the probate is usually kept four or five days.

The directors of the Bank will not permit executors to sell out specific bequests of stock, and pay it to the legatees, but require the executor to transfer it to them, so as to put it wholly into their power.

Stock given by will does not vest immediately in the legatee, but in the personal representative in trust. *Doug.* 507.

When money is ordered to remain in the Bank for the use of any person, and no trustees are named in the will to receive the dividends, the directors of the Bank will not permit it to be transferred into the names of trustees, to be appointed by the party interested, but will keep it in the testator's name.

If

If dividends are given by will to a widow for her use, and the principal, after her decease, to the testator's daughter, the directors of the Bank will not permit the executors to sell out any part of the stock, not even to raise a portion for her daughter, with the consent of all parties. Nor will they suffer any such *subjected* legacy to be touched for the payment of the testator's debts, till all other funds are exhausted. And even then they will require from the executors an exact statement of debtor and creditor of the personal estate, attended by an affidavit of the truth of it; and that they have not, in possession or expectancy, any other means or resources for payment of the debts of the deceased. This circumstance ought to be well attended to in the making of wills, as a want of it may produce serious inconveniences.

Since the passing the *Stat. 37 Geo. III. c. 91*, persons should be careful not to refuse Bank-notes in payment; for, by this means, they may lose the advantage of arresting the debtor in the first instance; for, by that statute, affidavits to hold to bail must contain, that no offer has been made to pay the money in Bank of England notes payable on demand (fractional parts of twenty shillings only excepted). If, in the affidavit to be made, it shall be likewise sworn, that such offer has been made, so that the party cannot be arrested, the court or a judge may order the defendant to cause Bank-notes to the amount of the demand to be deposited, to answer the demand of the plaintiff; and, if such deposit shall not be made, upon affidavit thereof made and filed, defendant may be arrested. *Bank Indemnity-Act.*

BANKERS' DRAFTS. — See *Bills of Exchange*.

BANKRUPT.

It is to be lamented that the bankrupt-laws; which were intended solely for the benefit of creditors, are too often, by debtors, converted into an engine of fraud. Unprincipled men too often involve themselves deeply in debt; and, having placed their property beyond the reach of their creditors, are, by the help of a friendly commission (as it is called), enabled to defraud them of the principal part of their debts.

As commissions of bankruptcy may prove either an advantage or a disadvantage to the petitioning creditor, it behoves him, previous to his resort to this ultimate remedy of the law, to take a variety of circumstances into consideration.*

1. The first consideration is, whether the same beneficial end to himself may not be obtained by other means of a less rigorous nature; that is, by action: and this can only be determined by considering the peculiar circumstances and situation of the debtor. If it be known, for instance, that he has confessed a judgement to a creditor, it may be necessary to proceed by commission in order to defeat that judgement; and, if a judgement has been actually entered up, and the sheriff in possession, it may be still more needful. Or it may be prudent, in case any creditors are suing the debtor, to prevent their recovering the whole of their debts in exclusion of the others: or if it be known, that the debtor has *knavishly* laid out his money in the funds, or in the purchase of copyhold estates; those being species of property out of the reach of a judgement at law. But, even in those cases, there is room for the exercise of great prudence; for, if there are other very considerable debts

* See a recent publication, entitled *Considerations on a Commission of Bankruptcy*, published by BROOKS,

owing, a commission may prove less eligible than an action; inasmuch as a commission lets in all the creditors to an equal distribution of the debtor's property, without any preference or priority. This objection is of course removed if all the other debts are inconsiderable. — Or it may be imprudent to issue a commission if the debtor be considerably in arrear for rent: for, the landlord may distrain for his whole rent, though it be for more than a year, even after the messenger is in possession, or after sale by the assignees, if they remain on the premises; but he loses his remedy if the goods are removed, and will be entitled to one year only, as on executions, 2 *Bl. Rep.* 487; and, for the rest, must come in with the other creditors. And it should be well considered, whether there is enough remaining of the debtor's property to bear the expense of a commission. It may also be imprudent to issue a commission if a creditor has already a judgement, in case the debtor has good landed property, because such judgement is a lien upon that property, and the petitioning creditor forfeits it if a commission be issued.

2. The next consideration is, whether his debt be of such a nature that a commission may be incontrovertibly founded upon it; for, the debt to support a commission must be a legal debt; for, a debt in equity will in no circumstances be a foundation for a commission. *Forest*, 243: 2 *Chan. Caf.* 191: 1 *Atk.* 147: 2 *Vez.* 407: 2 *Str. Rep.* 899: 1 *P. Wms.* 783. And it may be proper to take care that the petitioning creditor's debt was contracted before the act of bankruptcy; for, this has been held to be indispensably necessary. 1 *Atk.* 73: 2 *Will.* 135. Yet there has been some doubt raised upon the subject. *Green*, 80: *Forest*, 243: 4 *Bro. Parl. Caf.* 327: 1 *Cooke's B. L.* 20.

3. The third consideration is, whether the act, upon which the bankruptcy is intended to be founded, bears such a relation in point of time to the petitioning creditor's debt,
and

and every material part of it, that it may be brought in under the commission. Without due attention to this circumstance, the petitioning creditor may defeat his own intentions. For, a commission of bankrupt relates back to the time of committing the act of bankruptcy, however remote it may be, and avoids all acts done by the debtor since the act of bankruptcy committed, without any regard to the nature of them, whether fair or fraudulent. So that a sale of goods by the bankrupt, subsequent to such act, is a sale of the assignees' property, and they may maintain an action for the recovery of them. The same rule holds as to the payment of money to the bankrupt, or receipt of money from him. And the commission not only sets aside every contract made or completed after the act of bankruptcy, but extends even to a judgement confessed by him; so that, if execution be issued out after the act committed upon a judgement confessed before, that execution is set aside. 1 *Vez.* 328: 2 *Black.* 829.

In two or three instances, indeed, the legislature has stepped in to prevent the manifest injuries which so extensive an influence must in some cases occasion: and these are, that it shall not extend to the prejudice of any debtor of the bankrupt, who paid his debt to him after the act committed, without knowing of his bankruptcy; or to purchasers for valuable consideration, unless the commission be sued out within five years after the bankruptcy; or to payments *bonâ fide* (that is, honestly and fairly, without any contemplation of the bankruptcy) made by the bankrupt in the course of trade. 1 *Jac. I. c. 15, sect. 14*: 21 *Jac. I. c. 19, sect. 14*: 19 *Geo. II. c. 32, sect. 1*: 1 *Salk.* 108.

Now it is evident, from these observations, that cases may occur, where a commission would be most unadvisable. For, if many of the creditors dealings with the bankrupt have been so recent as to have been subsequent to the act of bankruptcy committed, he may experience the mortification

mortification of acting for the benefit of others, and to the injury of himself.

4. A commission may be advisable on another ground. It frequently happens, that a man may have great demands upon another, without being able in a court of law to give such evidence of it as the law requires ; and, in this case, a commission may be eminently useful ; because, under a commission, a man's own oath proves his debt, and it rarely happens that it is disputed. If, indeed, on the objection of the bankrupt or a creditor, any doubt should arise, other evidence may become necessary ; but of this there is but small probability, if the transaction wears the marks of ordinary credibility.

5. It may happen, that the debt of the petitioning creditor may at law be barred by the Statute of Limitations ; [See the article **LIMITATIONS OF ACTIONS** ;] and then a commission is his only chance, unless he can revive his debt, by obtaining a promise of payment from the debtor, in the presence of a witness, or under his own hand ; for, it is held, that the aforesaid statute does not extinguish the debt, but only bars the plaintiff from pursuing his ordinary remedy at law. 1 *T. Rep.* 481. But, in this case, if the debtor himself makes this objection the ground of an application to supersede the commission, the case may be different. 1 *Cooke's B. L.* 11. If, however, the debt be considerable, it may be well worth while to try the experiment.

6. And, as an action cannot be maintained on a bond or note payable at a future day, and there is good ground to believe that the debtor intends to quit the country, before the money secured becomes due, or judgement can be obtained, a commission will be necessary to prevent the removal or disposition of the goods ; for, though an action will not lie before the money becomes due, such securities may be made the ground of a commission.

7. It

7. It may often so happen, that a person has both joint and several creditors, and possesses joint and several property; but his joint property and debts may be very considerable, and his separate property very trifling. In this case, it may be very imprudent for a separate creditor to issue a commission, because the joint creditors would be entitled to the joint fund, in exclusion of the separate creditors; and are moreover entitled to prove under a separate commission, and to receive dividends in proportion to their debts with the separate creditors. But as to this, see, under a subsequent article, *Of the proof of debts*. A joint creditor may also sue out a separate commission. 1 *Cooke's B. L.* 242.

8. And, lastly, it may be sometimes necessary where a debtor is in a state of dangerous illness; for, if there are debts of a higher nature owing, and as those debts must be paid in full if nothing be left for debtors of an inferior class, [See EXECUTORS,] it may be prudent to issue a commission, whereby all will be let into an equal distribution of the property.

We will now turn our attention to this subject in a practical way; and, in order thereto, we will first point out what trades are sufficient to make a man a bankrupt, premising that a *chapman*, or one who *buys and sells any thing*, though his dealings do not bring him under the denomination of any particular trade, may become a bankrupt,

I. *Who may or may not be bankrupts,*

The following traders, &c. MAY become bankrupts:

Bankers.*		Carpenters, who are not merely workmen, but buying timber and materials to carry on trade.
Brokers.		
Brickmakers.		
Butchers.		

* For references to cases in support of these positions, see 1 *Cooke's B. L.* p. 23 to 58.

Clergymen

Clergymen trading.	Nailers.
Clothiers.	Pawnbrokers.
Coal-dealers.	Plumbers.
Dyers.	Salesmen.
Factors.	Scriveners.
A Farmer, as a potatoe-merchant.	Freighters.
Goldsmiths.	Shoemakers.
Iron-manufacturers.	Smugglers.
Members of parliament trading.	Tanners.
Milliners.	Vintners, being wine-merchants.

The following traders, &c. ARE NOT, as such, liable to be made bankrupts :

Ale-house keepers.*	Farmers of Customs.
Alum-manufacturers.	Dealers in the funds or stocks.
Artificers.	Graziers.
Butlers of inns of court.	Inn-keepers.
Carpenters, being merely workmen.	Labourers.
Owners or lessees of coal-mines.	Land-jobbers.
Proprietors of shares in companies or corporations.	Receivers-general of taxes.
Public contractors, and such like public officers.	Ship-owners.
Drovers of cattle.	Stock-jobbers.
Excisemen.	Working tailors.
Farmers.	Viſtuallers.
	As to <i>Brick-makers</i> , ſee a ſpecial caſe, 1 <i>T. Rep.</i> 34. <i>Parker v. Wells.</i>

A farmer may be a bankrupt, if, not confining himſelf to the advantage to be made by improving the *produce* of his farm, (whether it be manufactured by him or raw,)

* See *Cooke's B. L.* from p 53 onward.

he add to it by purchase, with intent to make a profit, beyond what would arise from the mere use and improvement of such produce. As if he buy potatoes, in addition to what he grows, with a view to gain by the sale; or if he buy apples to add to his own stock, and sell the cider.
1 *T. Rep.* 38.

But, although a farmer, as such, is not an object of the bankrupt-laws, and his merely buying a horse in the course of his business, and selling him again after using him for some time, will not subject him to the bankrupt-laws; yet, if he buy and sell now and then a horse for profit, as distinct from the concerns of the farm, he may be so liable.
1 *Str.* 513: 1 *T. Rep.* 573, *n. a.*

Where a person purchases a commodity for the purpose of adding to its value by an alteration which he shall make in it, with a view to profit in the sale, this *traffic* brings him within the bankrupt-laws. Such, accordingly, is the situation of a shoemaker, a tanner, or a butcher. 4 *Burr.* 2148.

It is an established maxim, that the *extent* of the trading is not material; but that the true criterion is, whether the party means to sell (with a view to profit) to any person who applies for the commodity in which he professes to deal. The intention of the party to sell generally to all customers, or as a favour to particular persons, is a question of fact to be left to the jury. 1 *Cooke's B. L.* 55: 1 *T. Rep.* 572, 3.

But buying and selling under particular restraints, and for particular purposes, is not a trading within the bankrupt-laws; therefore, a farmer, who buys cattle for his farm, and afterwards sells them again, cannot be a bankrupt. Nor a school-master, who buys books to sell to his scholars. Nor the owner of a mine, who buys candles to sell to his workmen. 1 *Salk.* 109: 5 *Geo. II. c. 30*: *Peake's N. P.* 76: 3 *Keb.* 451.

II. Of

II. *Of the act of bankruptcy.*

1. Departing from the realm. 2. Departing from his house. 3. Keeping house. 4. Procuring arrest, outlawry, or imprisonment. 5. Procuring money, goods, &c. to be attached or sequestered by legal process. 6. Making a fraudulent conveyance to a friend of lands or goods. 7. Procuring protection from arrests. 8. Endeavouring or desiring, by petition to the king, or bill in any of the king's courts, against any creditors, to compel them to compound or to procrastinate the payment of their debts. 9. Lying in prison two months. 10. Escaping from prison after arrest for a just debt of £100 or upwards. 11. Neglecting to satisfy a just debt to the amount of £100 within two months after service of process upon a trader having privilege of parliament.

On these acts, the following explanatory determinations have taken place:

1. That an *actual denial* to a creditor is evidence of keeping house. 5 *T. Rep.* 575.

2. That a conveyance by deed of *all* a trader's effects, to prefer *one or more* creditors, is an act of bankruptcy. 1 *Burr.* 478, 484, 2477: 1 *Cooke's B. L.* 86.

3. That a colourable *exception* of *part* will not prevent it. *Doug.* 86: 1 *Burr.* 480, 481: 1 *Black. Rep.* 362. And that delivering property of any kind by a trader to a creditor, in contemplation of a bankruptcy, and to give a preference, is fraudulent; and, if done by deed, is an act of bankruptcy. *Cowp.* 167: 4 *Burr.* 2174.

4. That lying in prison *two lunar* months is an act of bankruptcy. *Salk.* 109, 110: 2 *T. Rep.* 141.

5. That leaving house to avoid being arrested, on any particular day, or to avoid an attachment for nonpayment of money, is an act of bankruptcy. 5 *T. Rep.* 512: 7 *T. Rep.* 509: 1 *Atk.* 240.

6. That

6. That an act of bankruptcy once clearly committed cannot be purged by any subsequent conduct, but may be avoided by paying off or compounding with the creditors. 1 *T. Rep.* 59.

And it has been determined, that the following cases are not acts of bankruptcy.

1. To conceal goods to prevent their being taken in execution. 1 *L. Raym.* 725.

2. A denial on a Sunday, or at an unreasonable hour, or through sickness, or on account of an engagement. 1 *Atk.* 201.

3. Causing goods to be fraudulently taken in execution. *Cowp.* 629: 4 *Burr.* 2478.

4. Making a fraudulent sale of them, *unless it be by deed.* 5 *T. Rep.* 530: 3 *Ves. jun.* 85: 1 *Burr.* 674.

5. Paying a creditor in the common and usual course of payment; or paying money to a creditor who threatens legal process, when there is no collusion; or if the creditor begins to sue him, and he makes an assignment of part of his goods; because, then, it is deemed *compulsive* and not *voluntary*. Much, in cases of this kind, however, depends upon the circumstances of the first application coming from the debtor; for, this makes it voluntary, and a badge of fraud; unless indeed the debtor shall be proved to have acted under fear and apprehension of legal process, although that fear was in fact groundless. 1 *T. Rep.* 155: 6 *T. Rep.* 152.

6. Being denied by agreement or contrivance. 1 *Bl. Rep.* 441.

7. Being denied to a person coming on behalf of a creditor (except to a clerk with a bill of exchange or note). *Cooke's B. L.* 79.

8. Procuring an outlawry in Ireland. 2 *Sid.* 69, 114, 176.

9. Con-

9. Conveyance of *part* of his effects, except it be done in contemplation of a bankruptcy, and to give a preference. 1 *Burr.* 484: 2 *P. Wms.* 427.

10. Departing the realm to avoid a duty, unless creditors are actually delayed. 1 *Atk.* 196: 1 *Com. Dig.* 523.

11. A banker refusing payment, if he appears and keeps his shop open. 1 *L. Raym.* 725.

III. *Of debts to found commission.*

To one person £100 must be owing; to two, £150; three, or more, £200.

IV. *Of issuing the commission.*

Commissions must be issued in four days, exclusive of the day of striking the docket.

V. *Of the meetings of the commissioners, and of bankrupts' surrender and examination.*

The first meeting is private, to find the party a bankrupt; where observe, that the wife cannot be a witness to prove the act of bankruptcy, though she may for discovery of goods. 1 *P. Wms.* 611.

2. The second meeting is for choice of assignees, proof of debts, &c.

3. The third meeting is for the bankrupt to surrender, debts to be proved, last examination, &c.

The bankrupt must surrender within 42 days at farthest, after notice in the Gazette. But the time may be enlarged, not exceeding 50 days from the expiration of the 42 days.

Note. — The bankrupt is protected for the 42 days, if he surrender at the first meeting. When the bankrupt appears, the commissioners are to examine him, touching all matters relating to his trade and effects. They may also summon before them and examine the wife, and all other persons; and, on refusal, may commit them. If he conceals to the value of £20, or withholds books or writings with intent to defraud, it is felony.

VI. *Of the choice of assignees.*

Assignees are chosen, on the second meeting, by a majority of creditors in value, who have proved to the amount of £10.

VII. *Of the proof of debts.*

No security given for payment of money; such as notes, bills of exchange, &c. which cannot be produced, can be excepted; and commissioners will not suffer proof to be made without them. 1 *Cooke's B. Law*, 119: 1 *Atk.* 105.

Persons taking securities, payable, at *all events*, at a future day, for goods delivered to persons, who shall become bankrupts before the time of payment, shall be admitted to prove their securities, and receive their proportion, deducting interest from the time of payment to the time it would have become due. See *Stat.* 7 Geo. I. c. 31, sect. 1. — But, where the payment depends upon a *future contingency* whether it will be paid or not, as if a security be made to pay to the wife so much in case she survives her husband, here she cannot come in with the creditors, unless it be secured by a penalty which is forfeited at law; because, it is entirely uncertain whether she shall ever have any demand or not; and, in case of the event happening afterwards, she can come on the BANKRUPT'S future estate. *Atk.* 115, 116: 3 *T. Rep.* 435.

An obligee, in any bottomry or respondentia bond, and the assured, in any policy of insurance, shall be admitted to claim; and, after the loss and contingency, to prove the debt thereon, in like manner as if the same had happened before issuing the commission. 19 Geo. II. c. 32, sect. 2.

A mortgagee may choose whether he will come in as a creditor. 1 *Cooke's B. L.* 119.

Creditors of a joint estate, where there are no separate creditors, may exhaust both the joint and separate estate; but, where there are both joint and separate creditors, the joint

joint creditors shall have first their demand on the joint estate, and the separate creditors shall have first their demand on the separate estate; but, if there be a surplus of the separate estate, the joint creditors are entitled to it; for, the bankrupt has no right to any thing till they are fully satisfied. It was formerly the practice, where there were several *partners*, to take out *separate* as well as *joint* commissions against each; but now for a considerable time it has been allowed, that a petition may be received for an order for the *separate* creditors to come in, and prove their debts under the *joint* commission. And that the assignees shall keep distinct accounts; so that the *joint* creditors may be paid out of the *joint*, and the *separate* out of the *separate* estate; and the surplus, if any be, of either, to be carried in *aid* of the deficient estate. 1 *Atk.* 98, 138: 8 *T. Rep.* 140: 2 *Bro. Rep.* 15.

And yet it has been determined, that an order for keeping distinct accounts cannot, without consent, be made upon petition, when a separate commission has issued against one of the joint debtors; because, the solvent debtor has an interest in the distribution of the joint property, and the demands which may be made upon it, and therefore that relief must be sought by bill. 3 *Bro. Rep.* 477: 3 *Ves. jun.* 236.

The law seems to be, that, where *separate* commissions are taken out against *joint* traders, the joint creditors shall no farther prove their debts, under such *separate* commission, than for the purpose of assenting to the certificate, or dissenting. *Ibid.* But, for the purpose of convenience, it has been frequently, upon petition, ordered, that joint creditors may prove, and receive a rateable dividend, under a separate commission; but that they shall not be permitted to prove and receive a dividend from the separate estate, where there are solvent partners, until they have, by process of law against all the partners, recovered what they can from the joint stock. And it is to be observed, that joint creditors

cannot, in any case, prove under a separate commission, without the Lord Chancellor's order, made in consequence of a petition. And, even then, the payment of the dividend may be restrained, by the assignees filing a bill for that purpose. 3 *Ves. jun.* 238.

And it may be otherwise when there is a *joint* and *separate* fund, and the assignees, under a separate commission, possess themselves of the joint estate, and the separate creditors consent, that the joint creditors shall come in *pari passu*; for, then the case seems no longer within the reason of the rule. *Gilb. Evid.* 942.

VIII. *Of claims.*

When a debt cannot be sufficiently ascertained to be substantiated, and a claim is made, that claim must be substantiated in a reasonable time, or the commissioners may strike it out; and they generally do so before a dividend is declared. 3 *Wils.* 271.

IX. *Of election to come in under the commission.*

A *joint* and *several* creditor must elect whether he will prove against the joint or separate estate in preference; but he may come in on the surplus of either. 1 *Atk.* 98, 106.

A man shall not prove a debt and proceed in an action at law at the same time. However, the court will not absolutely stop him from bringing his action, but put him to his election; and, should he elect to proceed at law, he will still be allowed, by an order from the great seal, to prove his debt, for the purpose of assenting to, or dissenting from, the certificate; which permission is absolutely necessary to make his action at law of any avail; for, should the bankrupt procure his certificate, he will be thereby discharged from that action as well as from his other debts. 1 *Atk.* 83, 119, 220; 1 *P. Wms.* 562; 2 *Bl. Rep.* 1317.

But, where the creditor has proceeded at law, he is not obliged to make his election till a dividend is declared. 2 *Black. Rep.* 1317.

And

And the modern determinations have mostly put the creditor to his election before a dividend, provided a reasonable time be afforded him to inform himself of the bankrupt's affairs. *Cooke's B. L.* 130. But, notwithstanding these determinations, the present practice seems to require, that a dividend should be declared before the creditor can be put to his election, or at least that there should be funds in the hands of the assignees sufficient to make a dividend. 1 *Cooke's B. L.* 132. A petitioning creditor has no election of this kind. 1 *Atk.* 153: 2 *Atk.* 154.

X. *Of the dividend.*

A dividend must be made after four and within twelve months, a second should be made within eighteen months.

A person fails, and owes four men the following sums :

	£.	s.	d.
To A.	24	4	6
B.	28	5	6
C.	35	15	4
D.	48	14	8
	£137	0	0

His whole estate produces £54 16s. Now, in order to find the sum each creditor will be entitled to, we must first, by the rule of three, as in the following examples, see how much in the pound his estate will pay of the aggregate, which appears to be 8s. — Thus :

If £137 will pay 20s. what will £54 16 pay ?

$$\begin{array}{r} 20 \\ \hline 2740 \\ \hline \end{array}$$

$$\begin{array}{r} 20 \\ \hline 1096 \\ 20 \\ \hline \end{array}$$

$$\begin{array}{r} 2740 \overline{) 21920} 8 \\ 21920 \\ \hline \end{array}$$

We now ascertain each person's share in the same manner, viz.

If 20s. gives £24 4 6, what will 8s. give?

$$\begin{array}{r}
 20 \quad 12 \\
 \underline{12} \quad \underline{20} \\
 240 \quad 484 \quad 96 \\
 \underline{12} \quad \underline{12} \\
 5814 \\
 \underline{96}
 \end{array}$$

$$\begin{array}{r}
 34884 \\
 \underline{52326}
 \end{array}$$

$$\begin{array}{r}
 240 \quad 12 \quad 210
 \end{array}$$

$$\begin{array}{r}
 480 \quad 12
 \end{array}$$

$$\begin{array}{r}
 781 \quad 112
 \end{array}$$

$$\begin{array}{r}
 720 \quad 108
 \end{array}$$

$$\begin{array}{r}
 614 \quad 45
 \end{array}$$

$$\begin{array}{r}
 480 \quad 36
 \end{array}$$

$$\begin{array}{r}
 1344 \quad 9
 \end{array}$$

$$\begin{array}{r}
 1200
 \end{array}$$

$$\begin{array}{r}
 144
 \end{array}$$

$$\begin{array}{r}
 4
 \end{array}$$

$$\begin{array}{r}
 240 \quad 576 \quad (2
 \end{array}$$

$$\begin{array}{r}
 480
 \end{array}$$

$$\begin{array}{r}
 96
 \end{array}$$

$$\begin{array}{r}
 24 = \frac{4}{10}
 \end{array}$$

$$\begin{array}{r}
 240
 \end{array}$$

A's

	£.	s.	d.
A.'s share . .	9	13	$9\frac{1}{2}\frac{4}{10}$
B.'s share . .	11	6	$2\frac{1}{2}\frac{6}{10}$
C.'s share . .	14	6	$1\frac{1}{2}\frac{4}{10}$
D.'s share . .	19	9	$10\frac{1}{2}\frac{4}{10}$

£54 16 0

But, as in some cases, the number of shillings paid in the pound, as in the above instance, is an exact fraction of a pound, (8s. being $\frac{4}{10}$ of a pound,) each person's share may be known, by multiplying his debt by the numerator, and dividing by the denominator; thus:

£. s. d.

24 4 6

4

10)96 18 0

9 13 $9\frac{1}{2}\frac{4}{10}$

XI. Of the bankrupt's allowance.

The bankrupt's allowance is as follows, viz. if he pays 10s. in the pound, 5 per cent. not exceeding £200; when he pays 12s. 6d. in the pound, $7\frac{1}{2}$ per cent. not to exceed £250; when he pays 15s. in the pound, 10 per cent. not to exceed £300; if under 10s. in the pound, such allowance as the commissioners shall direct, not to exceed 3 per cent.

Note. — The allowance is upon the sum which shall remain after the allowance is deducted.

A bankrupt cannot call on his assignees for his allowance, under the 5 Geo. II. c. 20, sect. 7, if his certificate be not allowed before payment of the dividends. 6 T. Rep. 548.

XII. Of the bankrupt's certificate.

Certificates are obtained by the signature of 4 parts in 5, in number and value, of creditors who have proved to above the amount of £20, thus computed.

Number; suppose 150 creditors,

$$\begin{array}{r} 5)150(30 \\ \hline \end{array}$$

$$\begin{array}{r} 30 \\ \hline \end{array}$$

120 is 4 parts in 5 in number,

Value; debts above £20, £27245.

$$\begin{array}{r} 5)27245(5449 \\ \hline \end{array}$$

$$\begin{array}{r} 5449 \\ \hline \end{array}$$

21796 is 4 parts in 5 in value,

The certificate being completed, the bankrupt is free and discharged for ever from all debts owing by him at the time he became bankrupt, even though judgement shall have been obtained against him, and he lies in prison upon execution for such debts. 3 *P. Wms*, 23: 1 *Atk.* 67, 138: 2 *Str.* 1157.

But persons, cleared by a *bankruptcy*, *composition*, or *insolvent act*, becoming bankrupt again, are only indemnified as to their persons; but their future property is liable to their creditors, unless they pay under the second bankruptcy full 15s. in the pound. 5 *T. Rep.* 287.

And a certificate is no indemnity, if any creditor produces a fictitious debt, and the bankrupt does not discover it. 1 *T. Rep. C. P.* 647. Or if he has given with any of his children above £100 for a marriage-portion, unless he then had sufficient to pay all his debts. Or if he has lost at any one time £5, or in the whole £100, within 12 months before he became a bankrupt, by any manner of gaming or wagering whatsoever; or, within the time, has lost £100 by stock-jobbing. 5 *Geo. II. c.* 30, sect. 12.

Every

Every security given to the use of any creditor to induce him to sign a certificate is void. *Ibid.*: *Doug.* 673.

If some of the bankrupt's creditors are induced by money to sign the certificate, though the bankrupt does not know of it, even when he makes the necessary affidavit, yet, if he does before actual allowance, the certificate is void. *1 Doug.* 228.

But if the money be given without the bankrupt's privacy, to deprive him of the benefit of his certificate, and sufficient in number and value have signed, exclusive of those others, the certificate shall be valid. *1 Cooke's B. L.* 501.

If a creditor has taken money, it may be recovered back. *1 Doug.* 472.

An agreement to pay money to the assignees on certificate being allowed, though for the benefit of all the creditors, is void. *1 Doug.* 695.

Until the bankrupt's certificate is allowed, it is nothing; and it has no relation back to the time of its being signed. *2 Black.* 811.

And therefore an execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is valid. *1 T. Rep.* 361.

If a surety for the payment of a sum certain take an absolute bond from the principal, payable the day before the original bond will become due, and the principal become a bankrupt before the day of payment, the surety may prove his debt under the commission, and the bankrupt's certificate will be a bar to an action on the counter-bond. *2 T. Rep.* 640.

A certificate discharges a bankrupt from debts accruing before the act of bankruptcy, though judgement be not obtained till after the certificate allowed. *Cowp.* 25.

Every

Every fair and *bona-fide* creditor, who cannot come in and prove his debt under the commission, has a right of action against the bankrupt for such debt as was not due at the time of the act of bankruptcy committed. 3 *Wils.* 269, 270, 272.

The bankrupt's remaining liable, and the creditor not being able to prove his debt under the commission, are convertible terms. 1 *T. Rep.* 565.

Where a bankrupt has taken a lease, and entered into covenant to pay the rent, do the repairs, &c. though the lease is taken from him, and blended with the general mass of his property, and divided among his creditors, yet his certificate will not deliver him from his liability to perform the covenants contained in the lease. *Idem: T. Rep. C. P.* 433.

Where an annuity is secured by a deed of covenants, the growing payments are contingent, and therefore an action may be brought, notwithstanding the bankruptcy and certificate of the covenantor. 1 *T. Rep.* 86.

XIII. Of secreting bankrupt's property.

By *Stat. 5 Geo. II. c. 30*, every person, who shall accept any trust, or conceal any estate of the bankrupt, and shall not, in 42 days after issuing the commission, and notice thereof in the Gazette, discover the same in writing to one or more commissioners or assignees, and submit to be examined, shall forfeit to the creditors £100, and double the value of the estate concealed, by action of debt with full costs.

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in an action of *trover*; but, if they bring an action of *assumpsit*, they affirm the contract, and then the creditor may set off his debt. 4 *T. Rep.* 211.

XIV. Of property of which the bankrupt is reputed owner.

Property,

Property, of which the bankrupt is reputed owner, is vested in the assignees by the commissioners' assignment. But, when a bankrupt is in possession of the goods of another, *bonâ fide* with the consent of the owner, at the time of the bankruptcy, for a specific purpose, beyond which he has not the right of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them under the *Stat.* 21 Jac. I. c. 19, sect. 11: 7 *T. Rep.* 228. And this is to prevent persons in trade obtaining credit by the possession and apparent ownership of goods not their own, and thereby deluding their creditors. *Ibid.*

If the furniture of a house of a trader be taken in execution by a creditor, and, without ever being removed, be let by him to the occupier at a yearly rent, and he becomes bankrupt while in possession of it, the assignees may seize it under the *Stat.* 21 Jac. I. c. 19, sect. 11: 1 *Pul. and Bos.* 82.

XV. Of dealings with bankrupt persons.

It is no defence to an action for a debt due that the plaintiff has committed an act of bankruptcy, of which the defendant had notice, no commission having issued nor proceedings had for that purpose; for, though voluntary payments under such circumstances are not expected, yet payments enforced by coercion and judgement of law are valid against assignees, in case a commission is afterwards taken out. But there must be no collusion. *Wat. on Part.* 319.

The *Stat.* 1 Jac. I. c. 19, and 19 Geo. II. c. 32, compounded, provide, that, if a person, who does not know of an act of bankruptcy, pays money for any commodity, it shall be held a good payment, and he shall not be liable to pay it over again to the assignees.

Money, owing out of England to a bankrupt payable to his order, may be attached by the law of the place, after the bankruptcy, for a debt due before it. 1 *Doug.* 170.

A creditor may, on the event of his debtor becoming bankrupt, retain money come to his hands, where mutual credit has been given; though his debt is not payable till a future day, and such retainer be contrary to the agreement between them. 7 *T. Rep.* 378.

If a person become a bankrupt, being under acceptances to a large amount, in favour of another, and that person, in whose favour the bills have been accepted, (not knowing of the bankruptcy,) send a parcel of goods for the specific purpose of enabling the bankrupt to discharge the acceptances, which parcel is taken by the assignees: the person who sent such goods, having paid the bankrupt's acceptances, may recover back the goods so sent after the bankruptcy; on the ground, that they were sent for the particular purpose of paying those acceptances; and that, as that purpose was not answered, the property in the goods, &c. remained in him. 5. *T. Rep.* 215.

A person, who has arrested another before the bankruptcy, may detain him in prison up to the moment of his obtaining his certificate. 1 *Cooke's B. L.* 332.

A banker is not justified in paying the drafts of a person who has placed money in his hands, after he has notice of an act of bankruptcy committed by him. 2 *T. Rep.* 113.

A. lent his acceptances to the defendant before his bankruptcy, but they were not paid until afterwards. A. may maintain an action against the defendant for money paid to his use, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant, before his bankruptcy, gave his receipt to A. acknowledging so much money as the acceptances amounted to. 7 *T. Rep.* 364.

BARGAINS. — See *Contracts*.

BARON AND FEME. — See *Husband and Wife*.

BATTERY.

BATTERY. — See *Evasion*.

A battery differs from an assault in this, that an assault consists of an offer or attempt to commit violence; as to *strike at* a man with or without a weapon: [See article ASSAULT:] whereas a *battery* is the *actual striking* a man; that is, in a battery, the person must be actually touched. — Any injury whatsoever, be it never so small, being *actually done* to the *person* of a man, in an angry, or a revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him, are *batteries* in the eye of the law. 1 *Hawk. P. C.* 263-4. But in *assaults*, where the damages given are under 40s. the defendant is liable to no more costs than damages. *Stat.* 21 Jac. I. c. 16, sect. 22, 23.

BILLS OF EXCHANGE.

Bills of exchange and promissory notes, being among merchants and traders in continual circulation to an immense amount, it is of importance for all men in business to be made acquainted with the outlines of the law on those subjects.

- I. As to their being stamped.
- II. Of the nature, kinds, and forms, of bills.
- III. Of their essential qualities.
- IV. Of the acceptance.
- V. Of indorsements.
- VI. Of presentment of bills.
- VII. Of notice, and herein of protests.
- VIII. Of bills lost, stolen, or forged.
- IX. Of the consideration and of bills over due.
- X. How far bills and notes are payment.

I. *As to their being stamped.* — Any holder of any bill, note, draft, or order, made after July 20, 1797, stamped with

with a stamp of a different denomination than required, if of equal or superior value to the stamp required, may produce it to the head officer, or such officers as the commissioners shall appoint; and the same may, on payment of the duty and penalty after-mentioned, be stamped with the proper stamp. If it shall be produced before the same is payable, the penalty is 40s.; but, if the same shall be payable before the production thereof, £10. 37 Geo. III. c. 136.

By 31 Geo. III. c. 25, for every piece of paper, &c. on which any bill of exchange, draft, or order for the payment of money, *on demand*, shall be written, where the sum amounts to 40s. and does not exceed £5 5s. there must be a stamp-duty of 3d.; and, by 37 Geo. III. c. 90, an additional penny: *total, 4d.*

Above £5 5, and not exceeding £30, 6d. and 2d. *total, 8d.*

Above £30, and not exceeding £50, 9d. and 3d. *total, 1s. 0d.*

Above £50, and not exceeding £100, 1s. 0d. and 4d. *total, 1s. 4d.*

Above £100, and not exceeding £200, 1s. 6d. and 6d. *total, 2s. 0d.*

For every such bill, &c. payable *otherwise than to the bearer on demand*,

Amounting to 40s. and not exceeding £30, 6d. and 2d. *total, 8d.*

Above £30, and not exceeding £50, 9d. and 3d. *total, 1s. 0d.*

Above £50, and not exceeding £100, 1s. 0d. and 4d. *total, 1s. 4d.*

Above £100, and not exceeding £200, 1s. 6d. and 6d. *total, 2s. 0d.*

And for every such bill, &c. payable *on demand, or otherwise*,

Exceeding £200, 2s. and 8d. *total, 2s. 8d.*

The duty is payable by the maker or signer.

Foreign bills, drawn in sets, where the sum does

Not exceed £100, 6d. and 2d. *total, 8d.*

Above £100, not exceeding £200, 9d. and 3d. *total, 1s.*

Above £200, 1s. and 4d. *total, 1s. 4d.*

And every bill of each set is chargeable with the duty.

Exemptions.

Exemptions. — Drafts on bankers, payable to bearer on demand, bearing date on or before the day on which they are issued, and at the place from which they shall be drawn and issued, if the banker resides and transacts business as such, within ten miles of the place where actually drawn or issued.

The new duties commenced July 5, 1797.

Penalty. — Persons writing or signing, or causing to be written or signed, any bill, &c. or accepting or paying, or causing to be accepted or paid, any such, without being first stamped with the proper stamp, or upon which there shall not be some stamp resembling the same, shall forfeit twenty pounds.

The 9th Stat. of 31 Geo. III. c. 25, declares, that no bill, &c. shall be available in law or equity, unless stamped with the lawful stamp; and that it shall not be lawful for the commissioners to stamp any paper, &c. after any bill, &c. shall be written thereon, under any pretence whatsoever. As to bills and notes not stamped, see farther under the article STAMPS.

II. *Of their nature, kinds, forms, &c.* — The instrument, now under consideration, is of so great antiquity, and of such supereminent use among merchants, that it has long been an object of the peculiar consideration and care of the law. It is said to be like an open letter of request, whereby one man, denominated the *drawer*, calls upon a second, named the *drawee*, to pay a certain sum of money, at a given time, to a third person, called the *payee*; and, by this means, not only the internal commerce of a country is conducted without the necessity of conveying great quantities of cash from one place to another, but men, in the most distant parts of the world, may have money transmitted to them from any trading country. The *drawee*, after acceptance of the bill, assumes the new name of *acceptor*. If a fourth person be appointed to receive it, he who

who appoints is called the *indorser*, as he who is appointed is termed the *indorsee*; and he, who, for the time being, has the possession of it, is called the *payee*, or *holder*.

Bills of exchange are distinguished by the appellations of *foreign* and *inland* bills; the first being those which pass from one country to another, and the latter such as pass between parties residing in the same country.

Foreign and inland bills are nearly on the same footing; and the following are the common forms used:

£100. *London, Jan. 5, 1794.*

One month after date, please to pay John Noakes, or order, (or to me, or my order,) the sum of one hundred pounds, and place the same to the account of

To Mr. William Paywell, THOMAS STILES.
Fleet-street, London.

London, Jan. 3, 1798. Exchange for £50 sterling.

At sight, (or, at sight of this my only bill of exchange,) pay to Mr. William Brown, or order, fifty pounds sterling, value received of him, and place the same to account, as per advice, (or without advice,) from

To Mr. Edward Dale, &c. JOHN JONES.

London, Jan. 1, 1797. Exchange for 10,000 liv. Tournois.

At fifteen days after date, (or at one, two, &c. usances,) pay this my first bill of exchange (second and third of the same tenor and date not paid) to Messrs Johnson and Co. or order, ten thousand livres Tournois, value received of them, and place the same to account, as per advice, from

To Mr. Isaac Reeves, ALFRED SKINNER CLARK.
Banker, in Paris.

Grand

Grand Caicos, June 18, 1798. *Exchange for £30 sterling.*

At sixty days sight of this my first bill of exchange, (second, third, and fourth, of the same tenor and date not paid,) pay to T. A. or order, thirty pounds, for value received, and place it to my account, with or without farther advice from, Sir,

To Mr. I. Stone,
Merchant, London.

Your obedient humble servant,

A. G. FREELAND.

The other bills of the foreign set are varied accordingly, as first, third, and fourth, not paid, &c.

Note. — Bills of exchange and promissory notes, unless the contrary be shewn by the defendant, are presumed to have been made on a good consideration. The words *value received* are not material. *Lutw: 889: White v. Ledwick, K. B. Hill. 25 Geo. III.*

Sometimes exchange is made in the name, and for the account, of a third person, by virtue of full power and authority given by him, and this is usually termed *procuracion*; and such bills may be drawn, subscribed, indorsed, accepted, and negotiated, not in the name, or for the account, of the manager or transactor of any or all of these branches of remittances, but in the name, and for the account, of the person who authorized him. *Lex Merc.*

The bills above-mentioned are considered merely as *securities* for money; but there is a species of each, which is considered as *money itself*; these are *Bank-notes*, *banker's cash-notes*, and *drafts on bankers*, payable on demand.

Bank-notes are considered to be money, as much as guineas themselves. 3 *T. Rep.* 554. *Banker's cash-notes* and *drafts on bankers* are so far considered as money among merchants, that they receive them in payment as ready cash; and, if the party receiving them do not, in reasonable time, demand the money, he must be at the loss, in
H. case

case of the banker's failure. What is to be considered as precisely reasonable time is necessarily undetermined, and is now a question of *law*, to be determined by the court. But the best general rule is, to present them the day they are received, if, from the distance and situation of the parties, that may be conveniently done. 1 *Black. Rep.* 1. And it has been lately said, from the bench, that, if a possessor of a draft on a banker does not keep it longer than twenty-four hours, after he receives it, before he tenders it for payment, and within that time the banker stops payment, the drawer is obliged to pay the money. *Metcalf v. Hall*, Sitings after Easter Term, at Guildhall, 1792. *Beawes*, 482.

A banker's draft is only taken conditionally, *if paid*, and not otherwise, unless there is an express agreement to take it as cash. 2 *Salk.* 442: 2 *L. Raym.* 928.

It is said, a banker's draft, payable to bearer, and indorsed, is a bill of exchange against an indorser, and that he is equally liable. 1 *L. Raym.* 743.

III. *Of the essential qualities of bills and notes.*—1. They must be for the payment of *money only*, and not for the payment of money, and doing some other act. 2 *Str.* 1271.

2. They must carry with them a *personal* and *certain* credit, given to the drawer or maker, not confined to credit on any particular fund. 3 *Wilf.* 213. With respect to a note, however, if the drawer promise to pay out of a particular fund, then within his power, the note will be good, under the statute. 5 *T. Rep.* 482.

3. They must be absolutely payable at all events, and not depend on any particular circumstances, which may or may not happen. 3 *Wilf.* 213: 1 *Burr.* 325: 5 *T. Rep.* 482. But, *note*, there are cases where, although a bill or note is not a negotiable instrument, and therefore cannot be proceeded upon as such, yet may be made the ground of an action, upon a special agreement. 5 *T. Rep.* 482.

For,

For, where instruments are denied the privilege of bills and notes, if the fund, from which they are directed to be paid, can be proved to have been productive, or the contingency upon which they depend has happened, they may be used as evidence of a contract. 2 *Black. Rep.* 1072.

IV. *Of the acceptance.* — An acceptance is an engagement, by the drawee, to pay the money contained in the bill, according to the tenor of the acceptance.

It may be either written or verbal, and that either by word or letter, as well as by writing on the bill itself. 1 *Atk.* 717 (613).

An acceptance, made before the bill is issued, is rather an agreement to accept than an acceptance; but such an agreement is equally binding as an acceptance itself. 3 *Burr.* 1663: 1 *Atk.* 715 (611): *Doug.* 284.

If, after the bill is issued, the drawer cannot be found, or refuses to accept, or if his credit be suspected, or he cannot, by reason of some disability, render himself responsible, then the acceptance by another, in order to prevent the return of the bill, or to procure the negotiation of it, or to save the reputation of, and prevent an action against, the drawer, or some of the other parties, is not unusual, and is termed an acceptance for the honour of the party, on whose behalf it is done.

An acceptance is, generally, according to the tenor of the bill; but it may be for a less sum, or an enlarged sum, or an enlarged time. 1 *Str.* 214: or at another place than that mentioned. 2 *Str.* 1195: or it may be conditional; as, to pay when certain goods, consigned to the drawer, and for which the bill is drawn, shall be sold. *Id.* 1152.

A very small matter will amount to an acceptance, and any words will be sufficient for the purpose; as, "Call for it to-morrow, and it shall be accepted," &c.: but see *Cowp.* 572, 4: 1 *Atk.* 715 (611): 3 *N. Abr.* 610.

A servant, who usually conducts, for his master, business of this kind, may accept. 3 *N. Abr.* 611.

If the acceptor die before payment, there must be a demand made on the executor or administrator, when it becomes due; and, on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c.

If a bill is not accepted, on presentment, an action on the bill will lie immediately against the drawer, although the time of payment is not come. 1 *Doug.* 55.

V. *Of the indorsement and transfer.* — *Bills and notes*, payable *to order*, are transferred by indorsement; and indorsements are either *in full* or *in blank*. A full indorsement is that by which the indorser orders the money to be paid to some particular person by name: a blank indorsement consists only of the name of the indorser. Blank indorsements are most frequent, indeed almost universal, in business; for, by this means, the bill or note is afterwards transferrable by delivery only, and every holder is an indorsee. *Doug.* 617.

The transfer of a bill or note may be made even after the day of payment; and, in the case of bills, where the drawer resides at a distance, is frequently made before acceptance. *Doug.* 611 (633). See *Pl. IX. sub.*

On a transfer by delivery, it is said, that the person making it (*i. e.* the delivery) ceases to be a party to, or security for, the payment of a bill or note. *L. Raym.* 442: 12 *Mod.* 241: 1 *Salk.* 128. Yet it seems there can be little doubt that he is liable in an action for money had and received. 2 *T. Rep.* 757: 4 *T. Rep.* 177.

Where the transfer may be by *delivery* only, that transfer may be made by any person, who, by any means, whether by accident or theft, has obtained the possession. See *Pl. VIII. sub.* And any holder may recover against the drawer, acceptor, or indorser in blank, if such holder gave
a va-

a valuable consideration, without knowledge of the accident. 1 *Black. Rep.* 485. The same principle applies to a bill negotiated with a blank indorsement. *Doug.* 611 (613). A holder, coming fairly by a bill or note, is not liable to be affected with the transaction between the original parties: but, on this head, see the article GAMING, and *Pl. IX. sub.*

If the holder of a bill or note die, his executors or administrators may indorse it; but, on their indorsement, they are liable personally. 1 *T. Rep.* 487: 10 *Mod.* 315.

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions. 3 *N. Abr.* 610.

If a bill or note be made payable to several persons, who are not in co-partnership, the indorsement must be by all of them. *Doug.* 630 (653). *n.*

VI. *Of presentment of bills, &c.* — If a person takes a draft upon another, for payment of a debt, and holds it an unreasonable time before he demands the money, and the drawee becomes insolvent, he cannot afterwards recover against the drawer. 2 *Wils.* 353.

Bills and notes, payable *after date*, must be presented on the last of the three days of grace, within seasonable hours.

If a bill or note be made payable *at a banker's*, demand at the banker's is sufficient: and if it falls into the hands of the banker, where made payable, it is a sufficient demand for him to turn to his books, and see the maker's or acceptor's account with him; and a sufficient refusal, to find that he had no effects in his hands. 2 *H. Black.* 509.

It seems to be the opinion of my Lord Kenyon, that there is no rule of law, to fix the time when bills payable abroad, at so many days *after sight*, should be sent to the place of their destination: but it should be done in reasonable time, according to the circumstances of the case; and the jury is to determine what is reasonable time for that purpose. And, as to notice to be sent home of the bill being dishonoured,

he said, it would be too strict a rule to lay it down, that a party in India should be bound to send notice to England, by the chance conveyance of a foreign ship, and that it was sufficient that notice be sent by the first regular ships which sail to England. 2 *H. Black.* 565.

In this case, *Mr. Justice Buller* observed, that the only rule he knew of, which can be applied to all cases of bills of exchange, is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable *at sight*, or *at so many days after*, or in any other manner. But he thought, that a rule might thus far be laid down as to *laches*,* with regard to bills payable at sight, or a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world, and their credit is looked to; and if a bill, drawn at three days sight, were kept out, in that way, for a year, it could not be said there would be laches. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, he was guilty of laches. *Ibid.*

A bill of exchange, payable sixty days *after sight*, becomes due sixty days after acceptance, or after protest for non-acceptance. 6 *T. Rep.* 200. And of the sixty days, it seems that the day next after the sight is reckoned the first, and not the day whereon it was presented. *Marius.*

It is said, that a bill dated the 30th of January, payable a month after date, is payable on the 28th or 29th of February, being the last day of the month: and so in bills payable a month after sight, if presented on the 30th of January, are payable on the last day of February, though February hath not so many days in it, regard, of course, being had to the three days of grace.

* *Neglect, delays.*

In bills of exchange, &c. a month is understood to mean a calendar month.

VII. *Of protest and notice.* — If a banker in London give up a bill of exchange to the acceptor, upon receiving a check upon another banker for the amount, and it turn out that the check is dishonoured, the party is not liable as for negligence. 6 *T. Rep.* 12.

I. *As to foreign bills.* — If acceptance be refused, they must be *protested* whatever the sum be, and whether payable after date or sight. The bill should, in this case, be kept, but the protest sent away to the drawer, or, if indorsed, to the last indorser, by the very next post after acceptance refused. *Bull. N. P.* 271: 2 *T. Rep.* 713.

Whether the bill be accepted or not, it should be presented for payment at any time the last day of grace, within reasonable hours.

If payment be refused, a notary must demand it, and protest it on the last day of grace; and both bill and protest must be sent away.

As this protest on a foreign bill must be made on the last day of grace, and immediate notice sent to the parties concerned, it seems established as a rule, that such a bill is payable on demand made at any time that day within reasonable hours, and the acceptor has not the whole day to pay the bill. 4 *T. Rep.* 170.

Though, in order to entitle himself to call on any of the preceding parties, in default of payment by the acceptor of a bill or maker of a note, it be necessary that the holder should give due notice of such default to the party to whom he means to resort, yet notice to that party alone is sufficient. As against him it is not necessary that any attempt should be made to recover the money of any of the collateral undertakers, or, in case of such attempt being made, to give notice of its being without effect, &c. See ante *Of presentment of bills.*

It is not determined that it is necessary to present bills for acceptance; but, if they are presented, and it be refused, the steps above pointed out must be pursued. 5 *Burr.* 2670.

A protest is only material on foreign bills, and should be within the regular hours of business; and by the next post transmitted to the correspondent, or the drawer will be discharged. 2 *T. Rep.* 714.

If a foreign bill be returned dishonoured, the drawer is liable for the whole amount of the re-exchange. 2 *H. Black.* 378.

2. *As to inland bills.* — If acceptance be refused, they should be noted, if payable after date, and if for £20 or upwards; but not if payable after sight, or if value be not expressed to be received, although for £20 or upwards; and give notice to the drawer, or, if indorsed, to the last indorser. Whether it be accepted or not, present it for payment at any time of the last day of grace within reasonable hours. If payment be refused, and it be payable after date, and for £20 or upwards, and value be expressed to be received, it should be protested after the expiration of the last day of grace, and sent away by the next post.

The want of protest on inland bills does not destroy the remedy which the party had before against the drawer for the principal money, 3 *N. Abr.* 612, and is only necessary to entitle the party to interest and costs.

If, on account of the holder's delay, any loss accrue by the failure of any of the preceding parties, he must bear the loss. 1 *T. Rep.* 712. And notice of the bill being dishonoured must be given to all parties meant to be charged, indorsers as well as drawer. The notice is sufficient whether verbal or in writing. If the parties reside at a distance from the holder, proof of putting the letter containing such notice in the General Post, properly directed, is held sufficient evidence of the notice. 2 *H. Black.* 509: 1 *T. Rep.* 170.

It is not sufficient for the holder merely to give notice of the drawer's refusal or insolvency, but it must be added, that he means to hold the party to whom notice is given to his responsibility, and will look to him for payment. 1 *T. Rep.* 170: 2 *Black. Rep.* 747 and 2 *T. Rep.* 713.

The necessity of giving notice of non-acceptance or non-payment is done away, by shewing that the drawer held no effects in the hands of the drawee at the time. 2 *T. Rep.* 713: 2 *H. Black.* 336.

The insolvency of the drawer does not take away the necessity of notice, where value has been given. 2 *H. Black.* 336.

But, where it is known that the defendant is only an indorser to guarantee the debt of the party, who is *prima facie* liable to pay, the indorsee cannot maintain an action against such indorser, without having used due diligence in presenting the note as soon as it became due for payment, and in giving immediate notice of the non-payment. 2 *H. Black.* 609.

The rule seems to be, that notice must be given to the drawer or indorser by the first post, that is, the post of that day, if the time will permit after the dishonour of the bill. 1 *T. Rep.* 168: *Doug.* 497. It might, perhaps, be more convenient to extend the rule till the post goes out on the next day, as that would cut off all questions and litigation, upon the possibility of giving notice on the same day. 2 *Chr. Black. Com.* 470, note.

And this distinction is said to be observed, that, if the drawee absolutely *refuses* to pay the bill, notice should be sent away by the post of that evening; but if he only temporizes, then, as he has the whole day to pay it, it will be sufficient if notice be sent off by the post of the succeeding day.

3. *As to promissory notes.* — They must be presented for payment on the last of the three days of grace. 4 *T. Rep.*

148. But no protest is necessary on non-payment. It is, however, necessary that, in default of payment, the holder should give notice to the indorser that he is not paid, and that he looks to him and not to the drawer for payment. And this notice must be the same, as to expedition, as in case of bills of exchange.

VIII. *Of bills lost, stolen, or forged.* — If the possessor of a bill loses it, he must cause intimation to be made by a notary-public, before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And, by *Stat. 9 and 10 W. III. c. 17*, if any inland bill of exchange for £5 or upwards shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him.

If a Bank-bill, payable to *John Jones*, be lost, and it is found by a stranger, payment to him would indemnify the Bank; yet *John Jones* may have an action of trover against the finder, though not against the person to whom he transfers it for a valuable consideration, without notice. 3 *Salk.* 71.

But the bearer of a note which has been lost, to entitle himself to recover upon it, must come by it honestly; and, when he has so come by it, he shall never be subjected to lose what he hath purchased in the course of trade, for consideration and without notice. 1 *Black. Rep.* 485.

A Bank-note of which the mail had been robbed, having been purchased, without knowledge of the robbery, for a valuable consideration, it was held, that the purchaser was entitled to it against all the world. 1 *Burr. Mansf.* 452.

Stealing or forging bills or notes is felony. *Stat. 2 Geo. II. c. 25*; 9 *Geo. II. c. 18*; 31 *Geo. II. c. 22*, sect. 78.

IX. *Of the consideration. Of bills over due, and when their negotiability ceases.* — One of the most common defects of bills of exchange and promissory notes arises either from

from the total want of consideration, or from the illegality of the consideration, for which the bill or note was paid.

In the case of negotiable securities, the general rule is, that the *bona-fide* holder of a note or bill has nothing to do with the transaction between the original parties; but this rule has its exceptions; usury, gaming, infamy, may all be set up. 7 *T. Rep.* 601.

If the acceptor of a bill has refused payment of it, and it is taken up by the drawer, its negotiability ceases; and the drawer cannot afterwards maintain an action thereon as indorsee against the acceptor. 1 *H. Black.* 88. When a bill is given, payable to *Richard Ranger*, or order, the purpose is, that it shall be paid to *Richard Ranger*, or order; and, when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. *Id.* 89, n.

Whether the drawer of a bill, or indorser of a note, receiving the bill or note in the regular course of negotiation, before it has become due, can, in the character of indorsee, maintain an action on it against the acceptor or maker, seems undecided; but it is clear, that a drawer or indorser cannot, as indorsee, recover against the acceptor, *where the indorsement is after the refusal of payment. Idem, in the notes.*

And, although it has not been determined that a bill or note is not negotiable after it becomes due, yet, whenever it is done, it being out of the usual course of trade, that circumstance alone throws such a suspicion upon it, that the indorsee must take it on the credit of the indorser, from whom he received it, and must stand in the situation of the person to whom it was payable; 3 *T. Rep.* 80, 83; *i. e.* he must be subject to the same equities as between the person of whom he received it and the party sued on such bill. 7 *T. Rep.* 64, 423.

X. *How far bills and notes are payment.* — If a draft or bill, given in payment of a debt, be dishonoured, the party receiving

receiving it may consider it as a nullity, and act accordingly. *1y. M. 35 Geo. III.*

But it has been always holden, that giving a bill of exchange is payment in satisfaction, provided the bill be paid when due. *7 T. Rep. 713.*

If a seller of goods take bankers' notes for them, without agreeing to run the risk of their being paid, and the notes turn out to be worth nothing, this will not be considered as payment. *7 T. Rep. 64.*

BILL OF LADING.

A bill of lading is a memorandum, signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there are usually three parts; one kept by the *consignor*, one sent to the *consignee*, and one kept by the *captain*.

The first occasion, on which the law relative to *bills of lading* came much under discussion, was in the case of *Caldwell and others v. Ball*, reported very much at length and with great accuracy in *1 T. Rep. 205*. That case was fully argued at the bar, and very much debated on the bench. Amongst other things, the court held, that a bill of lading is an acknowledgement under the hand of the captain that he has received such goods, which he undertakes to deliver to the person named in the bill of lading. That it is assignable in its nature; and, by indorsement, the property is vested in the assignee. That where several bills of lading, of the same date, but of different imports, have been signed, no reference is to be had to time, when they were first signed by the captain; but the person, who first gets one of them by a legal title from the owner or shipper, has a right to the consignment. And, where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*,

a delivery according to such legal title will discharge him from all. 1 *T. Rep.* 205. The indorsement and delivery of a bill of lading to a creditor, *prima facie*, conveys the whole property in the goods from the time of its delivery; but, if the intention of the parties appears to have been to bind the net proceeds only, in case of the arrival of the goods, an insurance, made on account of the indorser after such indorsement, is good. 1 *T. Rep.* 745.

The next cause of importance on this head was that of *Lickbarrow v. Mason*, when it was held, that the consignor has a right to stop the goods *in transitu*, in case of the insolvency of the consignee; but, if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. 2 *T. Rep.* 63: 1 *H. Black.* 357: 5 *T. Rep.* 683.

The right of the consignor to stop the goods *in transitu* can only rest upon his original title, as owner, not divested, or upon a legal title to hold the possession of the goods, till the price is paid, as a pledge for the price. 1 *Espin. Rep.* 241.

It is not necessary, in order to divest the consignor's right to stop *in transitu*, that the goods should have been taken in the hands of the consignee himself. 3 *T. Rep.* 464.

If a factor, in consideration of goods being consigned to him, accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his *actual* possession, the consignor may stop them *in transitu*. 3 *T. Rep.* 119, 783.

An assignment of goods at sea as a security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. 2 *T. Rep.* 485.

Where goods were consigned to A. and, on his becoming a bankrupt, his assignee went to the inn where they were arrived,

arrived, and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt, the confignor could not afterwards stop them, because they were not then *in transitu*. 3 *T. Rep.* 464.

A confignor's right of stopping goods *in transitu* is not taken away by the consignees having partly paid for the goods. 7 *T. Rep.* 440.

Bills of lading are transferrable and negotiable by the custom of merchants. 5 *T. Rep.* 683.

There is no distinction between a bill of lading indorsed in blank (that is, with the indorser's name only) and an indorsement to a particular person. 2 *T. Rep.* 63.

The merchants and ship-owners, having failed in their attempt to get the responsibility, which some recent legal decisions had thrown upon them, removed by an act of parliament, lately held a general meeting; at which it was resolved, that the following alteration in a bill of lading should be recommended to be generally adopted: viz. "The act of God, the king's enemies, fire, and all and every other dangers and accidents of seas, rivers, and navigation, of whatever nature and kind soever, excepted." But, in respect to the West-India trade, where a certain risk of boats is understood to attach to the ship, it was recommended to insert in the bill of lading these words, "Save risk of boats, so far as they are liable there to," immediately preceding the word "excepted." In the coasting-trade, where no bills of lading are used, it was recommended that the words of exception should be introduced in the receipts given for the goods.

BILLS OF SALE.

It is a general rule that, in the transfer of goods and chattels, the POSSESSION must accompany and follow the deed. 2 *T. Rep.* 587. Therefore, where the conveyance is
absolute,

absolute, possession must be delivered immediately; but, where the goods are sold upon a *condition* to be performed by the *vendee*, a bill of sale will not be rendered void by the vender's continuing possession till the condition be performed. *Ibid.* — But this observation does not apply, where the condition is to be performed by the *vender*; as if it be to pay a sum of money on a certain day to redeem them. For want of attention to this distinction, very injurious errors have been committed.

As an absolute conveyance of personalty without possession is in point of law *fraudulent*, and not merely *evidence of fraud*, (2 T. Rep. 587,) it follows, that goods conveyed cannot be secured against creditors, while they continue in the possession of the vender, *apparently as his own*; even though that possession has been but for part of a day, if during that time any acts of ownership have been exercised by the vender. 1 Espin. Rep. 205.

The Stat. 13 Eliz. c. 5, which relates to frauds against creditors, directs, "That no act whatever, done to defraud " a creditor or creditors, shall be of any effect against such " creditor or creditors;" and, therefore, if the transaction be not *bonâ fide*, the circumstance of its being done for a *valuable consideration* will not alone take it out of the statute. There have been many cases where persons have given a *fair and full price* for goods, and where the possession was actually *changed*; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void. Cowp. 434.

And it is to be noted, that the mere *possession* of goods is not sufficient, in all cases, to subject them to an execution issued against the person so possessing them; as if it be satisfactorily proved that they are really and *bonâ fide* the property of a third person, as a trustee for the life of the person possessing them; or if they are under a marriage-settlement transferred to trustees for the use of the husband
for

for life, remainder to the use of the wife for life, &c. 2 *Esp. Rep.* 574: *Cowp.* 432.

If A. give a bill of sale to B. a creditor, in trust to sell, this being coupled with an interest, and not being a mere authority, would, it should seem, survive the death of A. *And. 1: Dier,* 190.

Bills of sale are sometimes used when a person, wanting a sum of money, deposits goods in the lender's hands as a security, which become forfeited if the sum borrowed be not repaid at the time agreed on.

Ships at sea may be transferred by the delivery of the grand bill of sale; and goods at sea may be assigned by a delivery of the bill of lading. 7 *T. Rep.* 228.

A delivery of the grand bill of sale of a ship at sea, on the mortgage of the ship, is equivalent to a delivery of the ship itself; and, if the mortgagee take possession on her arrival, he may maintain an action of trover against the assignees of the mortgagor if they take the ship from him, notwithstanding he made no demand, either on the bankrupt or his assignees. 2 *T. Rep.* 462.

But an absolute bill of sale of a ship at sea is void by 26 Geo. III. c. 60, sect. 17, unless the certificate of the registry be recited therein,* although the vendee give at the same time an undertaking to restore the ship on a future day, on payment of a certain sum advanced by him on the credit of this security. And, although the vendee had also the grand bill of sale, and had taken possession of the ship immediately on her arrival, it was held, that he could not retain the ship, as having a lien on her against the assignees of the vender, who became a bankrupt after this transfer of the ship. 3 *T. Rep.* 406.

* But a mere clerical mistake will not vitiate it. 4 *T. Rep.* 161.

BOND. — See *Tender*.

The stamp-duties on bonds are as follow :

1. When they are not for payment of money, 10s.
2. When for payment of money, if not above £100,

10s.

If above £100, and under £500 . . £1 0

If £500, or upwards £1 10

When for £1000, or upwards . . . £2 0

When for £2000, or upwards . . . £3 0

When for £5000, or upwards . . . £5 0

A bond does not seem properly to be an incumbrance on land ; for, it does not follow the land, like a recognizance and a judgement. And, even if the heir at law aliens the land, the obligee, in the bond by which the heir is bound, can have his remedy only against the person of the heir, to the amount of the value of the land. But he cannot follow it, when it is in the hands of a *bonâ-fide* purchaser. *Buller's N. P.* 175 : see SECURITIES FOR MONEY.

Where a bond has remained undemanded for principal and interest more than twenty years, it is of itself a presumption that it has been satisfied ; but it is only a ground on which the jury *may* presume satisfaction, it is in *itself* no legal bar. 1 *T. Rep.* 270.

It is a common case to give relief in equity against the penalty of bonds to perform covenants, &c. and to send it to be tried at law, to ascertain the damages. 1 *Sid.* 442 : *Max. of Eq.* 51, *Pl. XIII.* : see PENALTY.

BORROWING. — See *Bailment*.BOTE. — See *Eslovers*.

BOTTOMRY AND RESPONDENTIA.

Bottomry is a contract by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel, or *bottom* of the ship, as a security for the re-payment; in which case it is understood, that, if the ship be lost, the lender loses his money; but, if it return in safety, he receives back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. And, in this case, the ship and tackle, if brought home, (as well as the person of the borrower,) are answerable for the money lent. But, if the loan be not upon the vessel, but on the goods or merchandize, which must necessarily be sold or exchanged during the voyage, then the borrower only, personally, is bound to answer the contract; who, in this case, is said to take his money at *respondentia*. So that, in a loan on *bottomry*, the lender runs no risk, though the goods should be lost; and, on *respondentia*, he must be paid his principal and interest, though the ship perish, provided the goods are safe. 2 Black. Com. 457.

By the Stat. 19 Geo. II. c. 37, it is enacted, that all moneys lent on *bottomry* or *respondentia*, on ships bound to or from the *East Indies*, shall be lent upon the ship or merchandize only, and that the lender shall have the benefit of salvage; and that, if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandize be totally lost.

This statute has entirely put an end to that species of contract, which arose from a loan upon the mere voyage itself,

itself, as far only as relates to *India* voyages; but those loans may still be made in all other cases as at the common law, except in the following instance, which is another statute-prohibition. The *Statute*, 7 Geo. I. c. 21, sect. 2, declares, that all contracts, made or entered into for or upon the loan of any moneys by way of bottomry, on any ship or ships in the service of foreigners, and bound or destined to trade to the *East Indies*, or places beyond the *Cape of Good Hope*, (mentioned in the statute relating to the English East-India Company,) shall be void.

This act, it should seem, does not mean to prevent the lending of money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the British settlements in *India* under foreign commissions, and to encourage the lawful trade thereto. It seems to be allowed, that an *American* ship (since the declaration of *American* independency) is a foreign ship within the statute. *Parke on Insur.* 410, 415.

The risks to which the lender exposes himself are generally mentioned in the condition of the bond, and are nearly the same as those against which the underwriters, in a policy of insurance, undertake to indemnify. It has been determined that piracy is one of those risks; and, if a loss by capture happen, the lender cannot recover against the borrower; but this does not mean a temporary taking, but such as occasions a total loss. And it has been settled, that a lender on bottomry or at *respondentia* is neither entitled to the benefit of salvage nor liable to contribute in case of a general average; for which reason, the *Stat.* 19 Geo. II. c. 37, contains a positive provision to allow the benefit of salvage in the cases there mentioned. If, however, a man insures respondentia interest on a foreign ship, and be obliged to contribute to an average loss by the laws

of her country, English underwriters are bound to indemnify. *Id.* 421.

If a contract were made by colour of bottomry, in order to evade the statute of usury, it would then be usurious; and, as the hazard to be run is the very basis of the contract, it follows that, if the risk be not run, the lender is not entitled to the extraordinary premium. *Id.* 419.

If the ship be lost by a wilful deviation from the tract of her voyage, the event has not happened upon which the borrower was to be discharged from his obligation, as she was not lost by a peril, to which the lender agreed to make himself liable. 1 *Equ. Cas. Abr.* 373: 2 *Chan. Cas.* 238. And indeed it generally is expressly provided against in the bond.

If the borrower becomes bankrupt after the loan of the money, and before the event happens which entitles the lender to re-payment, he may prove his debt after the contingency shall have happened, as if the event had actually happened before the commission issued. 19 *Geo. III. c. 32, sect. 2.*

Bottomry and respondentia may be insured, provided it be specified in the policy to be such interest. And, by *Stat. 19 Geo. III. c. 37*, the lender alone can make such insurance, and the borrower can only insure the surplus value of the goods over and above the money borrowed. But money expended by the captain for the use of the ship, and for which respondentia-interest is charged, may be recovered under an insurance on goods, specie, and effects, provided it be sanctioned by the usage of trade. 3 *Burr.* 1394: *Parke, c. 1, p. 11.* Finally, where a person insures a bottomry-interest, and recovers upon the bond, he cannot also recover upon the policy. *Parke, 428.*

In the case of bankruptcy, it has been determined by Lord Mansfield, *in re Brown*, a bankrupt, *M. T.* 1785, that creditors, for money lent on bottomry, must come in with
the

the other creditors in the general dividend only, notwithstanding what may have been practised or supposed to the contrary heretofore.

It is understood, that a master of a ship may not take up money on bottomry where his owners reside, except he be a part owner; and then he may only take up so much as his share in the ship will answer; for, if he exceeds that, his own estate is liable to make satisfaction. But, when a master is in a strange country, where there are no owners, nor any goods of theirs or his own, and for want of money he cannot perform his voyage, he may take up money on bottomry, and all the owners are chargeable thereto. But this is understood where money cannot be procured by exchange or any other means; and, in the first case, the owners are liable by their vessel, but not in their persons, and they have their remedy against the master.

BOXING MATCHES. — See *Challenges to fight*.

The inhuman and degrading practice of prize-fighting, which was a few years since most unhappily revived in this country, in circumstances of zeal and encouragement perhaps never before known, has now, thanks to the humanity and good sense of the country, as happily subsided. — “ A diversion, founded on the bruises, and heightened by “ the discomfiture, the temporary or permanent disabling, “ the maiming or death, of human beings, is not a very “ rational or very manly amusement. The bets, the ebriety, the licentious brutality, naturally connected with “ such a spectacle, are adverse to every social interest and “ principle.” If the public taste should again become so much vitiated as to approve such brutal proceedings, it will be the duty of all good citizens to unite in their endeavours to suppress it. This practice is a great offence in the eye of the law; and, in a legal view of it, is termed an *affray*.

In order that no necessary information may be wanting, the following particulars, as to the mode of suppressing them by private persons, are selected from HAWKINS's *Pleas of the Crown*.

It seems agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding securities for the peace. Also it is said, that any private person may stop those whom he shall see coming to join either party; and hence it seems clearly to follow, that, if a man receive a hurt from either party in thus endeavouring to preserve the peace, he shall have his remedy by an action against him. And, upon the same ground, it seems equally reasonable, that, if he unavoidably happens to hurt either party in thus doing what the law both allows and commends, he may well justify it, inasmuch as he is no way in fault; and the damage done to the other was occasioned by a laudable intention to do him a kindness.

If either party be dangerously wounded in such an affray, and a stander-by, endeavouring to arrest the other, be not able to take him without hurting or even wounding him, yet he is not punishable; inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die; or carry him before a justice of peace, by whom he either is to be bailed or committed, &c.

Where two box for a wager, an action will not lie at the suit of the winner, the act being an unlawful one. *Bull. N. P.* 16.

BREWERS.

Private persons may brew in their own houses for their family, or to give away; but must not lend their brew-house

house for other purposes, under a penalty of £50. 22 and 23 Car. II. c. 5, sect. 10.

By the *Stat.* 32 Geo. III. c. 8, sect. 1, common brewers must not sell their beer in less quantities than casks of four gallons and a half.

Notice to the Excise-office must be given, and entry made, of places for brewing beer and ale. *Stat.* 12 Car. II. c. 24: 15 Car. II. c. 11: 5 Geo. III. c. 43.

By a by-law of the common-council, brewers drays shall not be in the streets of London after eleven in the forenoon in the summer, and one in the winter. 2 *Str.* 1085: *And.* 91.

BRIDGES.

If a man builds a bridge, and it becomes useful to the county in general, the county ought to repair; but, if built by a private person, and he has the benefit of it, he ought to repair. 2 *Black. Rep.* 685: 2 *Inst.* 701: 1 *Salk.* 359.

Where a particular district rebuilt a foot-bridge over a particular part of a stream, and converted it into a bridge for horses, carts, and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common public utility to the county; the county, and not the district, are bound to repair it. *Burr.* 2594.

A tenant-at-will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet, if it become dangerously ruinous to the necessary intercourse of the bridge, the tenant is bound, by reason of his possession, to repair it so far as to prevent the public being prejudiced. *L. Raym.* 856.

At common law, those, who are bound to repair public bridges, must make them of such height and strength as shall be answerable to the course of the water; and they

are not trespassers if they enter on any land adjoining to repair them, or lay the materials necessary for the repairs thereon. *Dalt.* c. 16.

A ville or particular person may be indicted for not repairing a bridge, and be liable to pay the fine assessed by the court; and they are to have their remedy at law for a contribution from those, who are bound to bear a proportionable share of the charge. *6 Mod.* 307.

And it seems that those, who are bound to repair a bridge, are bound to widen it, if the exigencies of the public require it. *6 T. Rep.* 194.

BROKERS. — See *Pawnbrokers.*

Brokers are those that make bargains between merchant and merchant, or merchants and tradesmen, in matters of money and merchandizes, for which they have a fee or reward. These are *exchange-brokers*.

By *Stat.* 6 Anne, c. 16, they are to be annually licensed in London by the lord-mayor and aldermen, and heavy penalties are imposed on persons acting without license. So in Bristol by 3 Geo. II. c. 31.

A person who, for brokerage and hire, negotiates and concludes bargains for stock, is a broker in point of law, *4 Burr.* 2103.

BUILDING.

If *Titius* covenants to finish and complete a building on or before the 29th of September, in consideration of which *Caius* covenants to pay £3800 by instalments; viz. a certain sum when the second floor shall be laid, a farther sum when the fourth floor shall be laid, and the remainder of the money when the whole shall be covered in and finished; and the work is not completed at the time, owing to great alterations in the plan, by which other work is done

done over and above the work originally designed; and *Titius*, on a fair valuation, appears to be entitled to a sum of £7059 1 9½; and *Caius* has refused or neglected to pay any of the sums in the article specified. By the terms of this contract, this sum of money is to be paid before the thing to be done is done; *Titius* is therefore entitled to an action for the money, without averring a performance on his part, and *Caius* to his remedy on the covenant; for, these are mutual and independant covenants, 2 *H. Black.* 389: see the principle of this case explained v. COVENANTS.

If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, an action lies against the builder. *Hob.* 131. In *London* a man may place ladders or poles upon the ground, or against houses adjoining, for building his own, but he may not break ground. And builders of houses ought to have license from the mayor and aldermen, &c. for a board in the streets, which are not to be encumbered.

In the new building of *London* it was ordained, that the outsidcs of the buildings be of brick or stone, and the houses of the principal streets to be four stories high, having in the front balconies, &c. *Stat.* 19 Car. II. c. 3.

The laws for regulating all buildings in *London*, &c. are reduced into one act by *Stat.* 14 Geo. III. c. 78.

BUTCHERS.

These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices; and were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this did not extend to selling calves, lambs, or sheep, dead, from one butcher to another. *Stat.* 23 Edw. III. c. 6.

By

By *Stat.* 2 and 3 *Edw.* VI. c. 15, (revived, continued, and confirmed, by *Stat.* 22 and 23 *Car.* II. c. 19, which is now expired,) butchers (and others), conspiring to sell their victuals at certain rates, are liable to £10 penalty, or twenty days imprisonment, for the first offence; £20, or pillory, for the second; and £40, or pillory and loss of an ear, for the third. Although the statute of *Charles* is expired, it does not seem to follow, that the statute of *Edward* is not yet in full force.

BUYING COMMODITIES. — See *Contracts*.

BY-LAWS.

The inhabitants of a town, without any custom, may make ordinances, or by-laws, for repairing of a church or highway, or any such thing, which is for the *general good of the public*; and, in such cases, the greater part shall bind all; though, if it be for their own private profit, as for the well-ordering of their common, or the like, they cannot make *by-laws* without a custom to warrant it; and, if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by the custom. 5 *Rep.* 63: 1 *Inst.* 110, b. : *Cro. Car.* 498: *Hob.* 212.

All *by-laws* are also to be *reasonable*; and ought to be for the *common benefit*, and must be consonant to the public laws and statutes, as subordinate to them. And, by *Stat.* 19 *Hen.* VII. c. 7, *by-laws* made by corporations are to be approved by the lord chancellor, or chief justice, &c.

By-laws, made in *restraint* of trade, are not favoured; but the distinction between such as are made to *restrain* and those made to *regulate* trade seems to be very nice. *Carter*, 120: 1 *Burr.* 12: 4 *Burr.* 1951.

. CALENDAR.

CALENDAR. — See *Time*.

A calendar-month is 30 or 31 days, except February 28, and in leap-year 29; and, by *Stat. 25 Geo. II. c. 30*, the opening of common lands, and other things depending on the moveable feasts, shall be according to the new calendar.

CANAL.

An original subscriber to a canal-navigation is not liable for any call made by the committee, after he has assigned his share. 7 *T. Rep.* 36.

CANDLES.

Makers of candles are by various statutes put under the control of the excise-laws, of which they form a material branch. By the *Stat. 8 Anne, c. 9, sect. 18*, during the continuance of the duties upon candles, no person shall use in the inside of his house any lamp, wherein any oil or fat (other than oil made of fish within Great Britain) shall be burned for giving light, under pain of 40s.

CARRIERS. — See *Ships*.

All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen, bargemen, and waggoners, come under the denomination of *common carriers*.

There is in law an implied contract with them, that they shall be answerable for the safety of the goods they carry. *Bull. N. P.* 70. And it is held that the porter acts as his servant. 5 *T. Rep.* 396.

It is not necessary, in order to charge the carrier, that the goods are lost *in transitu*, (that is, *on their passage*,) while immediately under his care; for, he is *bound to deliver*

ver them to the cognizee, or send notice to him, according to the direction; and, though they are carried safely to the inn, yet, if left there till they are spoiled, and no notice given to the consignee, the carrier is liable. 3 *Wils.* 429: 2 *Black. Rep.* 916.

If a common carrier be robbed of goods, he must be charged and answer for them, by reason of the hire. 1 *Ro. Abr.* 338; 1 *Salk.* 143. He is also answerable for them if they be accidentally burned, and for every thing which is not the act of God and the king's enemies. Even an armed force ever so great and irresistible does not excuse him. 1 *T. Rep.* 27.

A waggoner having lodged his waggon in an inn, an accidental fire broke out, which consumed it; he was adjudged liable; and it was held, that negligence does not enter into the grounds of this action; for, though the carrier uses all proper care, yet, in case of a loss, he is liable. 1 *T. Rep.* 27.

And it has been settled, that, if a common carrier from *London* to *York* charge and receive for cartage of goods to the consignee's house at *York*, from a warehouse there, where he usually unloads, but which does not belong to him, he must answer for the goods if destroyed in the warehouse by accidental fire, though he allows all the profits of the cartage to another person, and that circumstance be known to the consignee. 5 *T. Rep.* 389.

But when a carrier, between A. and B. is employed to carry goods to B. to be forwarded to C. and they are taken to the place of their destination, and are there put into the carrier's warehouse, for the use of which he receives no pay, but merely for the convenience of the person to whom they are consigned, till he had an opportunity of forwarding them, the law would perhaps consider him in a new relation, and he may not be liable to accidents by fire. 4 *T. Rep.* 581.

But

But although, by the general custom of the realm, a common carrier insures the goods at all events, yet he may make a special contract, or he may refuse to contract, in extraordinary cases, but on extraordinary terms. And when he undertakes, he ought not to be deceived. If, therefore, the owner of a stage-coach puts out an advertisement, "that he will not be answerable for money, plate, or jewels, above the value of £5, unless he has notice and is paid accordingly," all goods received by that coach are under that special acceptance; and, if money, jewels, or plate, be sent by it without notice, and being paid for, if lost, the coachman is not liable; 4 *Burr.* 2298; not even to the extent of the £5, or the sum paid for booking. *H. Black. Rep.* 298. In these cases, a *personal* communication is not necessary to make a special acceptance. *Advertisements, notice in the warehouse, and handbills*, which it is probable the plaintiff saw, or which he might have seen, it seems are sufficient.

It has been adjudged, that the carrier is not liable to answer for the loss of a *passenger*, unless a price be taken for the carriage of the goods, as well as for the carriage of the person, and then he is within the custom as a carrier. 1 *Salk.* 282. But, by the custom and usage of stage-coaches, every passenger pays for the carriage of goods above a certain weight, and there the coachman shall be charged for the loss of goods above such a weight. 1 *Com. Rep.* 25. And a hackney-coachman is not a carrier within the custom, unless paid expressly for that purpose.

But if one be not a common carrier and takes hire, he may be charged; for, where hire is taken, a promise is implied. *Cro. Jac.* 262. So if a man, who is not a common carrier, and who is not to receive a premium, undertakes to carry goods *safely*, he is answerable for any damages they may sustain through his neglect or default. 1 *Com. Rep.* 133.

If

If a common carrier is offered goods to carry, and reasonable hire, and he refuses, having room, he is liable to an action. But if, for want of room, he refuses to take charge of them, and they are obstinately put up behind the coach, he is not answerable. And he may refuse to admit goods into his warehouse at an unreasonable time, or before he is ready to take his journey. 2 *Show.* 127.

The carrier is excused if a pipe of wine bursts from its being in a ferment. *Bull. N. P.* 74.

If the carrier unpacks goods and takes away part, or, having brought them to the place appointed, takes them away secretly, *animo furandi*, and disposes of them to his own use, it is felony. Otherwise, taking away goods committed to his care, subjects him only to a civil action. 1 *Haw. P. C.* 61: 3 *Inst.* 367: 1 *Haw. P. C.* 33.

A carrier may retain goods for his hire. *L. Raym.* 166, 752.

In case of water-carriage, a delivery at the wharf is sufficient. 4 *T. Rep.* 397: 2 *Espin. Rep.* 693.

Where goods are brought by a carrier, if taken immediately from the waggon, the carrier or warehouseman has no claim for booking or warehouse-room. 1 *Espin. Rep.* 119.

Where a person contracted to carry goods from *Liverpool* to *Leghorn*, on the vessel arriving at Falmouth on her voyage, an embargo was laid on her "until the farther orders of council," it was held, that such embargo only suspended, but did not dissolve, the contract between the parties; and that, even after two years, when the embargo was taken off, the person contracting to carry was answerable to the other in damages for the non-performance of the contract. *Hadley v. Clarke and others*, *Trin.* 39 *Geo. III.*: 8 *T. Rep.* 259.

If the consignor of goods deliver them to a particular carrier by order of the consignee, and they be afterwards lost,

lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods. The action can only be brought by the consignee. *Id.* 330.

But an action will lie at the suit of the consignor, where he has made himself responsible to the carrier for the price of the carriage. 5 *Burr.* 2680: 1 *T. Rep.* 659.

A coach-owner is not liable for injuries happening to passengers by accident or misfortune, where there has been no negligence or default in the driver. 2 *Espin. Rep.* 533.

CATALOGUE. — See *Inventory*.

CAUSES AND EFFECTS.

In most cases the law hath respect to the *cause* or beginning of a thing, as the principal part on which all other things are founded; and herein the *next* and not the *remote* cause is most looked upon, except it be in covinous and criminal things; and, therefore, that which is not good at first will not be so afterwards; for, such as is the cause such is the effect. *Plowd.* 208, 268. If an infant or feme-coverte make a will and publish it, and after die of full age or unmarried, the will is of no force, by reason of the original *cause* of infancy and coverture. *Finch*, 12. Where the cause ceaseth, the effect or thing will cease. *Co. Lit.* 13.

CERTIFICATE.

Certificate or debenture for drawbacks must be on a four-shilling stamp.

CHALLENGE *to fight*.

It is a very high offence to challenge another, either by word or letter, to fight a duel; or to be the messenger of such

such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight, as by dispersing letters to that purpose full of reflections, and insinuating a desire to fight, &c. 1 *Hawk. P. C.* c. 63, sect. 3.

By *Stat. 9 Anne, c. 14, sect. 8, [See title GAMING,]*
 “Whoever shall (assault and beat or) challenge, or provoke
 “to fight, any other person or persons whatsoever, upon
 “account of any money won by gaming, playing, or bet-
 “ting, at any of the games mentioned in that act, shall,
 “on conviction by indictment or information, forfeit all
 “his goods, chattels, and personal estate, and suffer im-
 “prisonment, without bail, in the county-prison, for two
 “years.”

It is now every day's practice for the Court of King's Bench to grant informations against persons sending challenges to *justices of the peace*, and in other heinous cases,

CHANCE.

See *Accident, Consequential Damages, and Mistake.*

When a man commits an unlawful act by *misfortune* or *chance*, and not by design, there is a deficiency of the will; inasmuch as it does in this case observe a total neutrality, and doth not co-operate with the deed, which therefore wants one main ingredient of a crime; but, if a man be doing an unlawful act, and another follows from it, he is answerable to all the consequences. 1 *Hawk. P. C.* 39.

CHARACTER.—See *Master and Servant.*

If one tradesman apply to another for the character of a third person, and a good character as to his solvency is given, yet if, in consequence of this opinion, the party asking the question suffer loss through the person's insolvency, no action lies against him who gave the character,
 if

if it was given fairly; for, this would destroy all confidence between man and man. "If," said my Lord KENYON, "a person applies to a tradesman for the character of another, if he gives him his opinion honestly and fairly, though it may turn out afterwards that he is deceived in that opinion, that cannot be made the ground of an action." 1 *Esplin. Rep.* 442: and *Holt v. Fisher*, sittings in London, after Trin. 1798, MS.

But, if a man wickedly assert that which he knows to be false, and thereby draws his neighbour into a loss, as it one procure another to sell goods on credit to one whom he would not otherwise have trusted, by asserting that which he knew to be false, it is actionable. 3 *T. Rep.* 51. But, if the party, giving credit, knew that the party credited was in bad circumstances, an action will not lie. 1 *Esplin. Rep.* 290.

CHARTER-PARTY. — See *Freight*.

This instrument is what is usually called among merchants a *pair of indentures*, and contains the stipulation of agreements made between them and ship-owners. A charter-party of affreightment is an instrument containing all the particulars of an agreement, made between the merchant and ship-owner, for the freight of goods from one part of the world to another.

A charter-party is the same in civil law as an indenture at common law. There are two copies made, one signed by the merchant, and delivered to the master or owners, the other signed by the master, and delivered to the merchant.

The common law construes charter-parties, as near as may be, according to the intention of them, and not according to the literal sense of traders, or those that merchandize by sea; but they must be regularly pleaded. In cove-

nant by charter-party, that the ship should return to the River of Thames by a certain time, dangers of the sea excepted; and after, in the voyage, and within the time of the return, the ship was taken upon the sea by pirates, so that the master could not return at the time mentioned in the agreement; it was adjudged, that this impediment was within the exception of the charter-party, which extends as well to any danger upon the sea by pirates and men of war as dangers of the sea by shipwreck, tempest, &c. *Stile*, 132 : 2 *Roll. Abr.* 249.

A ship is freighted at so much per month that she shall be out, covenanted to be paid after her arrival at the port of London. The ship is cast away coming up from the Downs, but the lading is all preserved: freight shall in this case be paid; for, the money becomes due monthly by the contract, and the place mentioned is only to ascertain where the money is to be paid; and the ship is entitled to wages, like the mariner that serves by the month, who, if he dies in the voyage, his executors are to be answered *pro rata*. *Molloy de Jur. Mar.* 260. See FREIGHT.

If a part-owner of a ship refuse to join with the owners in fitting out of the ship, he shall not be entitled to the freight; but, by the course of the Admiralty, the owners ought to give security if the ship perish in the voyage, to make good to the owner standing out his share of the ship. Sir L. JENKYNs, in a case of this nature, certified that, by the law marine and course of the Admiralty, the plaintiff was to have no share of the freight, and that it was so in all places; for, otherwise there would be no navigation. *Lex Merc.*

CHASTITY.

The Roman law (Ff. 48, 8, 1) justifies homicide in defence of the chastity either of one's self or relations; and so,

so, also, according to *Selden*, (*de Legib. Hebræor.* l. 4, c. 3,) stood the law in the Jewish republic. The English law, likewise, justifies a woman killing one who attempts to ravish her. *Bac. Elem.* 34: 1 *Hawk. P. C.* 71. So the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent: for, the one is forcible and felonious, but not the other. 1 *Hal. P. C.* 485, 6.

CHEATS.

The distinction, laid down as proper to be attended to in all cases of this kind, is this; that, in such impositions or deceits, where common prudence may guard persons against their suffering from them, the offence is not indictable, but the party is left to his civil remedy; but, when false weights or measures are used, or false tokens produced, or such methods taken to cheat or deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. *Burr.* 1125.

Changing corn by a miller, and returning bad corn instead, is punishable by indictment, being an offence against the public. 1 *Seff. Ca.* 217. So, to run a foot-race fraudulently, and, by previous understanding with the seeming competitor, to win money. 6 *Mod.* 42. So, if an indentured apprentice enters for a soldier, and, having received the bounty, is discharged on his master's demanding him, he may be indicted. 1 *Hawk. P. C.* c. 71, sect. 3. But selling beer short of the just and due measure is not indictable as a cheat. 1 *Wilf.* 301: *Say*, 146: 1 *Black. Rep.* 274. Nor selling gum of one denomination for that of another. *Sayer*, 205. Nor selling wrought as and for gold of the true standard, the offender not being a goldsmith. *Cowp.* 323.

By the *Stat.* 30 Geo. II. c. 24, persons, convicted of obtaining money or goods by false pretences, or sending threatening letters in order to extort money or goods, may be punished by fine and imprisonment, or by pillory, whipping, or transportation. In indictments on this statute, it must appear what the false pretences were. 2 *T. Rep.* 581.

As there are frauds which may be relieved civilly, and not punished criminally, with the complaints whereof the courts of equity do generally abound, so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally. Thus, if a minor goes about the town, and, pretending to be of age, defrauds many persons, by taking credit for a considerable quantity of goods, and then insisting on his non-age, the persons injured cannot recover the value of the goods, but they may indict and punish him for a common cheat. *Barl.* 100: 1 *Hawk. P. C.* c. 71, sect. 6, n.

CHILD. — See *Parent and Child*.

CHURCH-WAYS. — See *Ways*.

COCKET.

An instrument given to merchants to signify that their merchandizes are customed.

COIN.

Any person to whom silver shall be tendered, any piece whereof shall be diminished, otherwise than by reasonable wearing, or that he shall suspect to be counterfeit, he may cut or deface it; and, if counterfeit, the person tendering shall bear the loss; but, if lawful money, the person cutting it shall receive it at the rate it was coined for: and, if
doubt

doubt shall arise whether it be counterfeit, the next justice or chief magistrate in a corporation shall determine. 9 and 10 W. III. c. 21.

Same as to gold money, by 13 Geo. III. c. 71.

When a person has accepted of money in payment from another, and put the same into his purse, it is at his peril, after his allowance, and he shall not take exception to it as bad, notwithstanding he presently reviews it. *Terms de la Ley.*

The Stat. 15 and 16 Geo. II. c. 28, imposes heavy penalties on persons uttering or tendering in payment any counterfeit coin, knowing it to be so; and upon persons who knowingly tender in payment any counterfeit money, and who, at the same time, have more in their custody, or who shall within ten days after knowingly tender other false money.

By the 14 Geo. III. c. 42, no tender of payment in silver money exceeding £ 25 at one time is a sufficient tender in law for more than its value by weight at 5s. 2d. per ounce.

Only silver and gold coin are proper coin; brass or copper are not within this denomination. 1 *Hale's P. C.* 195. And no person is obliged to take in payment any money which is not lawful metal, that is, of silver and gold. 2 *Inst.* 577. Except for sums under 6d. *Ibid.*

It is said a payment in farthings is not a good payment. 2 *Inst.* 517.

Where goods are delivered under an agreement to take a *specific parcel* of copper money in payment, a delivery of such copper will be a good bar to an action for the value of the goods, though, in fact, it was counterfeit money. 1 *T. Rep.* 225.

If a man furnishes goods in consideration of *counterfeit money* to be paid him, and he afterwards refuses to take it, he cannot recover in an action the value of the goods delivered. 1 *T. Rep.* 226.

COLLEGE-LEASES. — See *Tenant-Right*.

These, strictly speaking, are only leaseholds; yet custom has established them as real estates. They are made for twenty-one years absolute; and, at the end of seven years, are renewable for twenty-one years more, upon payment of one year's rent. They may become void if the rent is not paid or the renewal-fine. A small publication, usually called SIR ISAAC NEWTON's *Tables*, well explains every thing relative to fines paid on renewals.

The rate of interest for the letting of leases, and taking of fines by deans and chapters of cathedrals, and heads and fellows of colleges, was formerly fixed at £11 11 8 $\frac{1}{4}$; but colleges differ much in their setting of fines, and £9 per cent. is now by the chapters deemed sufficient.

COMBINATION.

Combinations, confederacies, and conspiracies, to do unlawful acts, or to do lawful acts to an unlawful end, are punishable before the unlawful act is executed. This is to prevent the consequence of conspiracies. 9 *Rep.* 57. But a confederacy, punishable by law before it is executed, must have these incidents: 1. It must be declared by some matter of prosecution; as by making of bonds or promises the one to the other. 2. It should be malicious, as for unjust revenge. 3. It ought to be false, against an innocent person. And, lastly, it is to be out of court voluntarily. *T. de la Ley*.

By *Stat.* 2 and 3 *Edw.* VI. c. 15, combinations amongst victuallers, &c. to raise the price of provisions, are severely punishable. See *BUTCHERS*.

So among tradesmen for the advance of their goods. 12 *Mod.* 248.

And, by the above statute, combinations amongst artificers to raise the price of labour are also punishable. And a conspiracy of the journeymen in any trade is unlawful, though

though the matter about which they conspire be lawful for them to do, if they had not conspired to do it. 8 *Mod.* 10.

For the new regulations, *see* JOURNEYMEN.

COMMANDMENT. — *See* *Servant*.

A master may command a servant to drive another man's cattle out of his ground, to enter into lands, to seize goods, distrain for rent, or do other things, if the thing be not a trespass to others. *Fitz. Abr.* A commandment of a thing is good, where he that *commands* has power to do it; and a verbal command in most cases is sufficient, unless it be where it is given by a corporation, or when a sheriff's warrant is to a bailiff to arrest, &c. *Bro.* 288: *Dier*, 202.

In trespass, &c. a master shall be charged criminally for the act of the servant done by his *command*; but servants shall not be excused for committing any crime, when they act by *command of their masters*, who have no authority over them to give such *command*. *Kel.* 13. And if a master *commands* his servant to distrain, and he abuses the distress, the servant shall answer it to the party injured. *Kitch.* 372.

If a person justifies as bailiff to another, and that he distrained cattle, *doing damage*, by *command* of his principal, and it cannot be shewn that the owner did command him, he shall be a trespasser. 1 *L. Raym.* 310. The same law for a distress for rent arrear; for, the *command* is traversable. 1 *Leon.* 150: 2 *Leon.* 215: 1 *Roll. Rep.* 46. But, in conusance for rent in replevyn by bailiff, the *command* is not traversable, because that goes to the right. 1 *L. Raym.* 310.

COMMERCE. — *See* *Bills of Exchange*.

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic

and merchandize, neither can they have a proper authority for this purpose; for, as these are transactions carried on between subjects of independant states, the municipal laws of one will not be regarded by the other. For this reason, the affairs of commerce are in a great measure regulated by a law of their own, called the law-merchant, or *lex mercatoria*, which all nations agree in, and take notice of. And in particular it is held to be part of the *law of England*, which decides the causes of merchants by the general rules which obtain in all commercial countries.

COMPOSITION. — See *Debtor and Creditor*.

COMMONS. — See *Levant and Couchant*.

No prescription can make that appendant, which is not so in its own nature. Common cannot be *appendant* to meadow or pasture, but only to lands, which are or have been arable. *Coke's Rep.* 36, b. 4. Common claimed to meadow or pasture must be appurtenant. *Ibid.*

No inhabitant, or parishioner, as such, has a right of common. 6 *T. Rep.* 59.

A right of common for all *cattle, levant and couchant*, cannot be claimed in right of a messuage only, without land on which *all cattle might be levant and couchant*. See LEVANT AND COUCHANT: 5 *T. Rep.* 46: 8. *T. Rep.* 396.

It was said by POWELL, *Just.* (2 *L. Raym.* 1015,) that a cottage contains a curtilage, and so there may be a levancy and couchancy upon a cottage; and that there is no difference between a messuage and cottage as to this matter. If there be four acres laid to it, it is a lawful cottage within the *Stat.* 31 Eliz. c. 7.

One commoner may maintain an action against another for furcharging a common, notwithstanding he may have himself furcharged it. 4 *T. Rep.* 71.

A lord cannot, by virtue of the statute of *Merton*, (20 H. III. c. 4,) inclose and approve against a common of turbary; (2 *Inst.* 87;) yet, where there is a common of pasture and a common of turbary in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture; for, they are distinct rights. Supposing one man has common of pasture, and another has common of turbary, in the same waste, he who has common of pasture cannot justify throwing down the lord's inclosure, provided there be sufficient common of pasture left, because another person has common of turbary in the same common. And, wherever rights are in their nature distinct, as common of pasture and common of turbary certainly are, it will be just the same, though they happen to concur in one and the same person. Upon these principles it is held, that the lord's right to inclose, under the statute of *Merton*, is not answered by shewing a right of turbary in the same waste; unless it be shewn that he is interrupted in his enjoyment of his common of turbary. 2 *T. Rep.* 391: 6 *T. Rep.* 741.

Hogs, goats, and geese, are not commonable. — Commonable cattle are horses, oxen, cows, and sheep. *Scrogg's Praet.* 46.

A common which has been enclosed thirty years shall not afterwards be thrown open. 1 *Vern.* 32. See ENCROACHMENT.

CONDITION. — See *Covenant*, *Penalty*.

CONFUSION, *Property by*.

Where goods of two persons are so intermixed that the several portions can no longer be distinguished, if the intermixture be by consent, it is supposed the proprietors have an interest in common, in proportion to their respective shares;

shares; but, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or cast gold in like manner into another's melting-pot or crucible, our law does not allow any remedy in such case, but gives the entire property, without any account, to him, whose original dominion (or property) is invaded, and endeavoured to be rendered uncertain, without his own consent. 2 *Black. Com.* 405.

CONSENT. — See *Consideration*.

CONSEQUENTIAL LOSSES AND DAMAGES.

See *Necessity*.

It is a fundamental principle in law and reason, that he who does the first wrong shall answer for all consequential or following damages. 12 *Mod.* 639. But this rule admits of limitations. Though a man does a lawful thing, yet, if any damage do thereby befall another, he shall answer, *if he could have avoided it*; and this holds in *all civil cases*. As if a man lops a tree, and the boughs fall upon another *ipso invito*, yet an action lies. So if a man shoots at birds, and hurts another unawares. So if I have land, through which a river runs to your mill, and I lop the fallows growing on the river-side, which accidentally *stop the water*, so as your mill is hindered. So if I am building my own house, and a piece of timber falls on my neighbour's house, and breaks part of it. So if a man assaults me, and I lift up my staff to defend myself, and strike another in lifting it up. But it is otherwise in criminal cases; for, there it is necessary that the *mind* be consenting to the action. *L. Raym.* 422, 3.

If I have a pond, I cannot let it out, that it may drown my neighbour's land. *Arg. Het.* 119, cites 6 *Edw. IV.* 6. If a stranger drive my cattle upon your land, whereby they
are

are distrained by you, I shall recover against the stranger for this distress by you. *Lane*, 67, cites 9 Edw. IV. 4. A smith pricks the horse of a servant, being on a journey to pay money for his master to save the penalty of a bond; both servant and master may have their several actions on the case, for the several wrongs they have thereby sustained. *Per Coke*, C. J.: 2 *Bull.* 344.

Where one is party to a fraud, all that follows by reason of that fraud shall be considered as done by him. *Arg. Cro. Jac.* 469.

A. breaks the fence of B. by which cattle gets into C.'s ground; C. shall have an action on the case against A. *Str.* 131.

If a man keeps a beast of a savage nature, it is at his peril to keep him up. *Gilb.* 187.

A. on a fair-day threw a large lighted squib into the market-house, at Milbourne-port, (which was a covered building supported by arches, inclosed at one end, but open at the other, and on both sides;) the squib fell on the stall of B. when another person, who stood by, to prevent injury to himself and the goods of B. instantly threw it across the market-place, when it fell on the standing there of C. who also instantly threw it to another part of the market-house, and, in so throwing it, struck D. in the face therewith, when, the combustible matter bursting, put out one of his eyes; it was held, that the intermediate persons, acting in self-defence, in repelling the danger from themselves, were not liable; but that A. who first threw the squib, was alone answerable for the injury he had occasioned. 3 *Wils.* 403.

CONSIDERATION. — See *Agreement, Contract.*

The chief grounds of contracts are *consent and consideration*; so that persons, who contract, must be in a capacity to

to consent, and there must be a sufficient consideration or motive. A consideration is expressed to be the proper material cause of a contract, and may be either expressed or implied. *Expressed*; as if I buy a horse of *Equus* for £20, I must pay the £20, or he may keep the horse. *Implied*; as that the host of a common inn may detain the horse of a guest, if he will not pay for his meat. For, in this case, the law doth intend and enforce a consideration. 2 Burr. 1012: 5 Rep. 19: Dier, 30.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or *bare agreement*, to do an act, or pay money on one side, without any compensation on the other, is totally void in law, and a man cannot be compelled to perform it. *Doctor and Student*, d. 2, c. 24. As if one man promises to give another £100: here there is nothing contracted for or given on one side, and therefore there is nothing binding on the other. But any degree of reciprocity will prevent the contract from being *naked*. Nay, even if the promise be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the Statute of Limitations,) it is no longer a naked agreement. And, as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such promise is authenticated by written documents. 2 Black. Com. 445, 6.

A consideration ought to be matter of profit and benefit to him to whom it is to be done, by reason of the charge or trouble of him who doth it. *Cro. Car.* 8. If a person hath disbursed several sums for another *without his request*, and afterwards such other says, that, in consideration he hath paid the said sums for him, he will repay him; this is no consideration, because it was executed before. *Moor*, 220: *Cro. Eliz.* 282. A mere voluntary courtesy will not be

be a good consideration of a promise; but the value and proportion of the consideration is not material; for, a shilling or a penny is as much binding as £100. Though, in these cases, a jury will give damages in proportion to the loss. *Hob.* 5, 106: 10 *Rep.* 76. And that is a voluntary courtesy which has been undertaken without any prospect of certain recompense. 2 *Str.* 728. But, if there was any *request*, there the benefit shall be deemed to be not voluntary, but done in pursuance of the request, and an action will lie. *Hob.* 105.

But, although a *request* has been made, yet, if it was in consequence of the *offer*, *advice*, or *inducement*, of the other party, it will not support an action. And it should seem, that any thing done in the course of a person's *business* or *employment* shall not be deemed a voluntary courtesy, but the foundation of a contract. *Trials per Pais*, 181: *Cro. Eliz.* 282: *Hutt.* 84.

And a court of equity will not relieve against an agreement merely on the ground of an inadequacy of consideration, unless fraud can be shewn. 2 *Atk.* 251: *Ambl. Rep.* 18. Yet, if there should be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to a fraud. 2 *Bro. Rep.* 175: 2 *P. Wms.* 203.

If A. proposes to sell goods to B. and gives him a certain time, at his request, to determine whether he will buy them or not, and B. *within the time* determines to have them, and gives notice thereof to A.; in this case, A. is not liable to an action if he does not deliver them to B.; for, B. not being bound by the original contract, there was no consideration to bind A. 3 *T. Rep.* 653.

A man cannot recover money due on an unlawful consideration, such as *usury*, *gaming*, or *smuggling*. See those three articles.

And,

And, though the consideration *be but in part unlawful*, yet it shall vitiate the action, which is founded in the consideration taken together. *Cro. Eliz.* 199.

And, though the party, claiming the protection of the law, has not been a party to the illegal transaction, yet, where the promise has arisen from it, he cannot recover. *2 Wils.* 133.

But, where the transaction is not in itself unlawful, no subsequent illegal use of it shall destroy the remedy. As, where A. sold tea to B. abroad, which was delivered at Dunkirk, though this tea was for the purpose of being smuggled into England, and that known to A. at the time; yet A. not being concerned in the smuggling, and it being a fair sale as to him, he may recover the price of the tea in England. *Cowp.* 341.

A man is not bound in equity to discover the consideration of a bond, which implies in itself a consideration. *Hardres*, 201.

CONSIGNMENT OF GOODS.

See *Bills of Lading, and Stopping Goods* in transitu.

CONSPIRACY. — See *Combination, Durefs.*

CONTRABAND GOODS. — See *Smuggling.*

Contraband goods are such as are forbid by statute, or the king's proclamation, to be exported or imported.

CONTRACTS.

See *Agreement, Consideration, Deposit, Market, Rents.*

A contract is an agreement between two or more persons, with a lawful consideration or cause. As if a man
fell

sell his horse, or other thing, to another for a sum of money; this is a good contract, because there is *quid pro quo*, or one thing for another.

There is nothing within the limits of trade and mercantile transactions more necessary to be known than the law, as it regards the making of contracts and bargains. For want of it, great losses are daily sustained, and much money is wasted in fruitless litigations. This subject is principally regulated by the *Stat. 29 Car. II. c. 3*; which, as it was made to prevent knavery, is emphatically styled “The Statute of Frauds and Perjuries.”

By this statute it is enacted, that, in the following cases, no *verbal* promise shall be sufficient to ground an action upon; but, at least, some *note* or *memorandum* of it must be made *in writing*, and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

I. *Where an executor or administrator promises to answer damages out of his own estate.*

II. *Where a man undertakes to answer for the debt, default, or misconduct, of another.*

III. *Where any agreement is made upon consideration of marriage.*

IV. *Where any contract or sale is made of lands, tenements, or hereditaments, or any interest in or concerning them.*

V. *And where there is any agreement that is not to be performed within the space of one year from the making thereof.*

VI. *And, farther, that no contract for the sale of goods, wares, and merchandizes, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer, 1st, accept of part of the goods sold, and actually receive the same; or, 2dly, give something in earnest to bind the bargain, or in part of payment; or, 3dly, that some note or memorandum*

dum in writing of the bargain be made and signed by the parties to be charged, or their agents thereunto lawfully authorized.

As this statute was made for the beneficial purpose of preventing frauds, and the perjuries consequent upon endeavours to establish pretended bargains, the courts of law and equity have been zealous in supporting its spirit and usefulness. And it is to be observed that, although a rigid adherence to the doctrines of this statute may in some instances bear hard upon innocent men, and appear to favour the villain who may invalidate a bargain made without the requisites prescribed by the statute, yet its usefulness on the whole has never been disputed.

I. By the first clause we are to understand, that executors or administrators shall not be charged with the payment of any sum due from their testator or intestate out of their own pockets, in consequence of any promise or undertaking they may make to that effect, unless such promise be reduced into writing, and signed by such executors or administrators. But on this clause of the statute it does not appear that any determinations have been made.

II. No one who undertakes *by parole*, i. e. *by mere word of mouth*, to pay the debt, or to make satisfaction for injuries done by another, shall be bound by such promise. On this clause it has been decided, 1. That, if the person, for whose use the goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, or it is void. As if the vender scruples to let the goods go without the money, and a third person desires him to let the other have the goods, and says, "If you do not know him, you know me, and I will see you paid;" or, "If he do not pay you, I will;" or, "You must supply my mother with bread, and I will see you paid;" or, "If you cure D. of a wound, I will see you paid;" for, these are collateral undertakings. —
But

But it is said, that, if the *original* credit was given to the promiser, and the seller cannot recover against the person for whose use they were furnished, then the person promising is liable, though it be merely verbal; as if he say, "Let A. have goods, and I will pay you;" or, "Look to me for payment;" for, those are undertakings as for himself, and he shall be intended the very buyer, though the delivery be to another by his appointment. 1. *Salk.* 27: 2 *T. Rep.* 70. And, 2dly, it is held, that there is no distinction between a promise to pay for goods furnished to the use of the third person, made *before* they are delivered, and one made *after* it. *Cowp.* 227: 2 *T. Rep.* 80. A promise to pay a sum of money as damages by a third person, upon a plaintiff's agreeing to withdraw the record, is not within the Statute of Frauds. 1 *Wils.* 305. But a promise to pay a *certain sum of money* in consideration of a stay of proceedings is. In the former case, it is quite uncertain as to the *quantum* of damages whether any would be recovered; and in this the debt is the *subsisting debt* of another. 2 *Wils.* 94.

Where a person gives an order for goods for a third person to a tradesman, and at the same time informs the tradesman they are for a third person, the person ordering them shall not be liable. 2 *Espin. Rep.* 567.

A promise by the indorser of an unpaid note, to indemnify the holder, if he will proceed to enforce payment against the other parties on the note, must be in writing. *Id.* 484.

But, wherever the person undertaking is jointly interested with others, though they receive the benefit of his undertaking, no note in writing is there necessary; for, the undertaking should be *solely* for the debt of another, which here is not the case. As, where an action was brought against defendant and two others for appearing for plaintiff without a warrant, and defendant promised that, if plaintiff would

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not

not prosecute his action, he would pay him £10 and costs. A note in writing in this case was held not necessary, *it not being a promise solely for the debt of another*, the defendant being himself originally liable. 3 Burr. 1888. But, per Holt, if A. says, "Do not proceed against B. for a debt, and I will give you £10," this would be within the statute. 5 Mod. 213: Comb. 362.

And, wherever a person is bound by law to do any act for another, or to procure it to be done, if it is done, though without the request of such person, a subsequent promise by him to pay is good without a note in writing. As, where a pauper was taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attended and cured her, and after the cure the overseers promised to pay him by parole; it was adjudged sufficient to charge them; for, the overseers are bound to provide for the care of the poor, and so shall be deemed originally liable. Buller's N. P. 281.

It is perhaps impossible to lay down any rules on this head that will universally apply; but each case must, under its own peculiar circumstances, be left to the discretion of the jury, to determine to whom the credit was originally given. And this circumstance shews the manifest necessity there is that merchants and tradesmen should in no instance be satisfied with the undertaking of a *third person*, unless it be in writing.

III. No promise, made in consideration of any proposed marriage, shall be binding, unless it be in writing and signed; as to which it has been held, that mutual promises to marry are not within the act, which relates only to contracts in consideration of marriage. 1 L. Raym. 387: Salk, 280: Bull. N. P. 280: Str. 34.

But an agreement by letter takes it out of the statute. 2 Vent. 261: 2 Ch. Rep. 147: 1 Vern. 110: 2 Vern. 322: Skin. 142: 2 Bro. Rep. 32: 3 Bro. Rep. 318.

A parent agreeing to give a child a marriage-portion, yet does not execute nor is party to the articles, but sets his name as a witness, he is still bound. 1 *Wilf.* 118.

IV. No contract by word of mouth for the sale of lands, or any interest therein, is good. It has been held, that this clause of the statute does not extend to a contract for the sale of *timber* growing upon land. *Bull. N. P.* 281: 1 *L. Raym.* 182.

A letter signed by the party is sufficient to prevent the operation of the statute, not only on this clause of it, but also as to agreements made in consideration of marriage; but, wherever a letter is relied on as evidence of an agreement, it must be stamped before it can be read; it must also distinctly furnish the terms of agreement: or it must at least refer to some written instrument, in which the terms are set forth. It must also appear that the other party accepted such terms, and acted in contemplation of them. 2 *Bro. Rep.* 32, 318: 3 *Burr.* 1663: *Prec. Ch.* 560: *Str.* 426: 1 *Atk.* 12.

It is an established rule, that a parole agreement in part performed is not within the provision of the statute. 2 *Bro. Rep.* 566. And in some cases the Court of Chancery will compel the discovery of merely parole agreements, and also a performance; but, whenever that is done, the terms of such agreement should be *clear, definite, and conclusive*; for, if the court can collect a *right of deliberation*, or a *place of repentance*, to have been *reserved*, the contract shall not be considered as complete, till it be reduced into writing, or in part performed. 6 *Bro. P. C.* 45: 2 *Bro. Rep.* 566. As to what acts amount to a part-performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it. *Amb.* 586: 1 *Bro. Rep.* 412. The giving of possession is therefore to be con-

sidered as an act of part-performance. 1 *Fonbl. Eq.* 175, n. But giving directions for conveyances, and going to view the estate, are not. 1 *Atk.* 12: 6 *Bro. P. C.* 45. Payment of money is also said to be an act of part-performance. 3 *Atk.* 4. But it seems that payment of a sum, by way of earnest, is not. *Pre. Chan.* 560: 2 *Eq. Ca. Abr.* 46, *Pl.* 12: 1 *Ch. Rep.* 128. But see 3 *Ch. Rep.* 16, and 2 *Freem.* 128. Nor does it appear that merely writing instructions for the attorney is sufficient, viz. "The lease renewed; Mr. Stokes to pay king's tax, also to pay Moore £24 a year half-yearly; Mr. Stokes to keep the house in repair, &c." For, it was, in the case of *Stokes* against *Moore*, said, (1 *Fonbl. Eq.* 166,) that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and, where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found, as in the formal introduction to a will. But it could not be imagined, that a name, inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required. 1 *P. Wms.* 770.

But an agreement in the party's own hand-writing, beginning thus, "I, A. B. agree to sell, &c." is a sufficient signing within the statute. 1 *Espin. Rep.* 190.

And it has been determined, that, in cases of sales of lands, the auctioneer is not to be considered as the agent of both parties; and therefore his entering the name of the buyer of a lot of land in his book, as the purchaser, is not a note in writing within the statute. *Id.* 101. Otherwise, as to sales of goods. 3 *Burr.* 1921.

V. No *parole* contract or agreement, let the consideration of the agreement be what it may, shall be binding, unless it be to be performed *within a year*. On this head, it has been resolved, that a promise to pay upon the return of a ship is not within the statute; for, it is possible that the
ship

ship may return within the year. So a promise to pay £6 a year wages, and to leave an annuity of £16 for life by will; for, it might possibly be performed within the year. *Bull. N. P.* 280: 3 *Burr.* 1278: 1 *Salk.* 280: 3 *Salk.* 9.

As to this point, the rule is, "That, where the agreement depends upon a contingency, and it does not appear but that the contingency will happen within the year, and it contains nothing to shew the contrary, there a note in writing is *not necessary*; because, the contingency may happen within the year, and so the agreement be performed within that time; but, where it appears, from the whole tenor of the agreement, that it is to be *performed after* the year, there an agreement in writing is required under the statute." 3 *Burr.* 1281.

VI. No contract for the sale of goods, of the price of £10 or upwards, shall be valid, unless,

1. The buyer shall accept and actually receive some part of the goods sold.
2. Or give something in *earnest*, or in *part of payment*.
3. Or some memorandum thereof be signed by the party to be charged.

This is a most material clause, and requires great attention, inasmuch as it does not appear that any *custom* or *usage* of trade or dealing can be set up to defeat the provisions of the statute. If I, by *word of mouth*, deal for 1000 sheep or 1000 sacks of flour, and no earnest be paid, nor any of the sheep or flour be delivered, nor any memorandum thereof be signed, the bargain will be void, and the seller may sell the same sheep or flour to any other person.

This doctrine has been lately exemplified, first, in the case of *Alexander v. Combes*, *Trin.* 28 *Geo. III. C. P.* It was an action of trover for sheep, tried before Mr. Justice Grose, at *East Grinstead*. It appeared that the plaintiff had agreed to buy the sheep of the defendant at *Lewes* fair, and to take them away at a certain hour.

There was no *money paid*, nor any *sheep delivered*. The plaintiff not coming at the appointed time, nor sending to take the sheep, the defendant sold them to another person; and the plaintiff obtained a verdict. But this verdict was afterwards set aside, and a nonsuit entered; the court being clearly of opinion, that, as there was no *earnest, delivery, or agreement in writing*, the Statute of Frauds prevented any property from vesting in the plaintiff. 1 *H. Black.* 20.

A written order, given by the feller of goods to the buyer, directing a third person, in whose care the goods are, to deliver them to the buyer, is a sufficient delivery within the statute. 2 *Espin. Rep.* 598.

It has formerly been held, that the statute relates only to contracts for the actual *sale* of goods, where the buyer is *immediately answerable*, without time given him by special agreement, and where the feller is to *deliver the goods* immediately; and that, upon this principle, where one bespoke a chariot to be made for him, and when made refused to take it, it was held to be not within the statute. It was considered as extending to contracts *executed*, not to such as are to be *performed in future*. 4 *Burr.* 2101: 1 *Str.* 506. But it has been since decided, that the statute does extend to *executory* contracts, and that the case concerning the chariot was out of the statute, not because it was an *executory* contract, but because it was for *work and labour to be done, and materials, &c. to be found*, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. 2 *H. Black.* 63.

On sales of goods by auction, where there is no note in writing, but the auctioneer (he being to this purpose considered as the agent both of the buyer and seller, 2 *H. Black.* 63) puts down the name of the buyer in his book, it is a note in writing within the statute. 2 *Burr.* 1921: 1 *Black.* 599. But it is otherwise on a sale of lands. 1 *Espin. Rep.* 101. See AUCTION.

And

And a broker, who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser and to his employer a *sale-note*, is to be considered as the agent of both parties, and such note sufficient within the statute. *Id.* 105.

In illustration of the terms *accepting* and *receiving* part of the goods sold, it may be observed, that, where goods were weighed by the purchaser's servant, it amounted to such a delivery as took the case out of the statute.

And where the statute says, that the memorandum shall be signed by the party, or some other person by *him lawfully authorized*, it does not intend an appointment by a letter of attorney, but that the contract be signed with the privity, consent, and approbation, of the principal. 2 *H. Black.* 63.

A sale of goods for more than £10 by *sample* at one place, to be afterwards delivered at another, is within the *Statute of Frauds*, if no part of the goods contracted for were delivered, nor any thing given by the buyer to bind the bargain, nor any memorandum thereof in writing. 7 *T. Rep.* 14. But this case was decided upon the principle that the sample was no part of the goods contracted for; so that, in cases of this kind, to make the bargain binding, it would be right to contract that the sample should be considered as a part of the goods sold.

As to warranties. — Warranties must be made *upon* the sale; for, if they be made afterwards, and not at the time of the sale, they are void warranties, unless perhaps a new consideration arises. A general warranty will not extend to guard against defects, which are plainly and obviously the object of one's senses; as, if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer be in this case blind. But if cloth be warranted to be of such a length, and it is not, there an action lies; for, that can-

not be discerned by sight, but only by collateral proof, the measuring of it. *Finch's Law*, 189.

Also, if a horse be warranted sound, and he wants an eye, though this seems to be an object of the senses; yet, as the discernment of these defects is sometimes matter of skill, an action lies. *Salk.* 24.

But a warranty *before* a sale may be good; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set it; and the buyer should take time to consider for two or three days, and then should come and give the seller his price, yet this warranty is good, because the warranty is the ground of the treaty. *L. Raym.* 1120.

3. A warranty can only reach to things in being at the time of the warranty, and not to things *in futuro*; as, that a horse is sound at the time of buying him, not that he shall be sound two years hence; but, if the vender knows the goods to be unsound, and hath used any art to disguise them; or if they are in any shape different from what he represented them to the buyer, this artifice shall be equivalent to an express warranty, and the vender is answerable for their goodness. 3 *Black. Com.* 159: 2 *Roll. Rep.* 5.

As to stopping goods in transitu, See BILL OF LADING, and STOPPING GOODS in transitu.

As to the execution of the contract.

If any contract be made to transfer the right of chattels, if it be immediately executed, the property is altered. Therefore, if A. contracts to sell B. a horse for £10, there, if B. either pays or tenders the money, B. has the property in the horse, and is entitled to an action. So, if A. tenders the horse, he may bring an action for the money; for, the right of the money is transferred by the bargain, and if such contracts were *executory*, i. e. if either party, at any other

other time after the bargain made, by a tender or offer to perform his part of the bargain, could not oblige the other to perform his, it would make all contracts perfectly uncertain. But, where the contract is executory on both sides, there, no intermediate right is transferred, but only a contract or agreement made. As if A. had promised to deliver the horse on a day to come, and B. promised on such delivery to pay £10, there, if A. deliver or tender the horse at the day, he has a right to the money; so, if B. at the day tender or pay the money, he has a right to the horse. But B. has no right to the horse without a tender of the money, nor A. any right to the money without a tender of the horse. But if A. tenders the horse and B. refuses to pay, A. need not deliver the horse to B.; for, the tender is sufficient, if the payment be not made by B.; for, on the tender of A. the payment of B. ought to have been made immediately according to the contract. But, if the contract was not only executory on the part of A. but farther executory on the part of B. also, as if A. agrees to deliver the horse, and B. agrees to pay him £10 at a month after the delivery, there A. must not only tender the horse, but deliver it without payment of the money, and has only an action for the money; because, the contract is so made as to be executory on the part of B. after the delivery of the horse by A. *Gilb. Action of Debt*, 365.

If A. contracts to deliver 400 quarters of barley in a year, at 16s. per quarter, these, being cumbersome goods, may be delivered at several times; and if A. tenders any part, (as suppose 20 quarters,) if he be not paid, he may refuse to deliver it; but, if A. delivers it, he waves the benefit of present payment, and the tender or delivery of part does not excuse him from delivering or tendering the rest; for, he must complete his bargain, in order to compel B. to perform his part. *Gilb. Action of Debt*, 366.

If

If a bargain be made which is executed in part by one side and executory on the other, the ancient rule was, that, if that part which was executory became impossible by the act of God, it was an excuse for not performing the bargain. As if A. sold a horse to B. in his stable, and the horse died, that excused the delivery, and A. should have an action of debt for the remainder of his money; but this must be understood with this distinction, that, if A. stipulates to deliver the horse, there, if the horse dies, this will excuse the delivery of the horse, but will not entitle A. to the money, because he was to have the money upon the delivery; but, if B. gave earnest for the horse, and by contract was immediately to take the horse, there, though the horse died, the loss was to B.; and so A. was entitled to the money. *Id.* 367.

As to earnest.

After earnest given, the vender cannot sell the goods to another without a default in the vendee; and, therefore, if the vendee does not come and pay, and take away the goods, the vender ought to go and request him; and then, if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. 1 *Salk.* 113.

An earnest only binds the bargain, and gives the party a right to demand, but then a demand of the goods without payment of the money is void; for, the money must be paid at the taking away of the goods, where no other time of payment is appointed. 1 *Salk.* 113.

Giving earnest will not, in case of the sale of lands, take it out of the Statute of Frauds.

And, whatever sum is paid for earnest, it is to be deemed part of the price when the goods come to be paid for. 1 *Saund.* 319. See DEPOSIT.

As to goods sold on credit. See CREDIT.

As to delivery of goods. See DELIVERY.

CO-PARTNERS. — See *Partners*.

COPYHOLDERS.

In order to put copyholders on their guard against forfeitures of their estates, the following short statement of causes of forfeitures are introduced, viz.

1. Refusing after due warning to do suit of court, unless prevented by inevitable accident.
2. If the tenant wilfully denies the lord his rent, being personally demanded.
3. Not performing services due to the lord.
4. If he sue a replevyn against the lord, on his lawful distress for his rent or services.
5. Refusing to pay a fine certain, on admittance, being demanded.
6. If the heir do not come in and be admitted, after three proclamations. But the *Stat. 9 Geo. I. c. 29*, makes a special provision for infants and married women. And the lord cannot seize a copyhold estate, as forfeited for want of a tenant, without a custom. 3 *T. Rep.* 162.
7. Granting a lease for more than one year without the lord's license.
8. Copyholder for life cutting down timber-trees.
9. If he commit waste: — voluntary, as pulling down a house, cutting down trees, &c. — permissive, as suffering the roof of his house to let in rain, or the house to fall.

Note. — Idiots and lunatics, though able to take copyholds, cannot forfeit them.

As to the effect of forfeiture. — It is to be observed, that the Court of Chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit on receiving satisfaction for the injury he has sustained. Such relief is particularly given where the waste is committed through *ignorance*, or where the waste is merely permissive, and there has not been an obstinate perseverance in neglect-

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ing to repair after notice. 1 *C. C.* 95: *Preced. Ch.* 568. Another instance, in which relief against forfeiture for waste is said to be proper, is, where the lessee of a copyholder commits waste without his direction or privity. *Toth.* 237. But in this latter case it may be doubted whether the waste is a forfeiture. *Mod.* 49.

Also, when the estate is forfeited for non-payment of rent, or fine, or such things where a value may be set upon them, and compensation made the lord on any laches of time, the tenant may be relieved; for, there, the land is but in nature of a security for those sums. *Preced. Chan.* 596, 572.

Where a lease for years is made without license, and not warranted by custom, and which is found to be a forfeiture at law, equity has nothing to do with it to give any remedy. It is like to a feoffment made or a fine levied by particular tenants, against which there can be no relief. *Ib.* 574.

Where copyhold lands are purchased in fee, in trust for an alien, the lands are not seizable by the king; nor is the trust forfeited to him; for, if the lands are forfeited as purchased for such alien, then the lord of the manor would lose his fines, services, &c. *Hard.* 436.

As to fines payable on admission. — If there be two coparceners or tenants in common of a copyhold, and the one dieth, and the other hath all by descent, he shall be admitted, and shall pay a fine. But, if two joint tenants be, and the one dieth, the other shall have all by the survivorship, without admittance or paying fine: because, joint tenants to all intents and purposes are seized *per my et per tout*, by a half and by the whole. *Sir Edward Coke's Complete Copyholder*, 162.

If two several copyholders join in a grant of their copyhold by one copy; or if one copyholder, having several copyholds, granteth them by one copy; yet the grantee shall pay several fines, for they shall enure as several grants. *Ibid.*

But

But if two joint tenants, or two tenants in common, or a tenant for life, and the remainder man join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only. So, if a surrender be made, and after a common recovery is had by plaint, in nature of a writ of entry, in *le post*, for the better assurance, one fine only shall be paid. *Id.* 163.

If a copyhold be surrendered for life, remainder to a stranger, though the admittance of tenant for life be sufficient to invest the estate in him in remainder, yet, upon the death of the tenant for life, he in remainder shall be admitted, and pay a fine. *Id.* 162.

So, if a copyhold be granted to three, *to hold for their successive lives*, where, by the custom, succession is in force, if any one dieth, he that next succeedeth shall be admitted, and pay a fine. *Ibid.*

On admittance where the fine is *certain* if the copyholder refuseth to pay it on demand, this is a forfeiture *ipso facto*. *Ibid.* — But, if the fine be uncertain, though a reasonable fine be assessed, yet, because no one is bound to provide for an uncertainty, the copyholder is not bound to pay it on demand: he shall have a convenient time to discharge it, if the law limit no certain day for payment of it; and if, within convenient time it be not discharged, it is a forfeiture without presentment. *Ib.* — But, if it be unreasonable, it is no forfeiture, though it be never paid. *Ibid.*

CORN.

It is illegal to sell corn by any other measure than the Winchester measure. 4 *T. Rep.* 750.

And the buyer of corn by any other than the Winchester measure forfeits the penalty of 40s. besides the value of the corn, by *Stat.* 22 and 23 Car. II. c. 12: 5 *T. Rep.* 353.

COVENANTS.

COVENANTS. — See *Acts, Contracts*.

If a man covenants for his heirs, it is then a covenant real, and descends upon his heirs, who are bound to perform it if they have assets by descent, but not otherwise. If he covenant for his executors and administrators also, his personal assets as well as his real are pledged. See DEBTOR AND CREDITOR.

Covenants are either *collateral*, or such as *run with the land*. Of these, *collateral* covenants, which do not touch or concern the thing demised in any sort, bind only the covenantor, and his executors or administrators who represent him. 5 Co. 16: Cro. Car. 188. — But covenants that *run with the land*, that is, which extend to something *in esse*, parcel of the demise, and affect the estate, lie between all those who are privy in tenure or contract, though not named. 1 Fonbl. Eq. 344.

A collateral covenant to be done upon the land, as to build *de novo*, shall bind the assignee if he be named. 5 Co. 16, b. But this liability of the assignee does not extend to covenants broken before the assignment; as a covenant to build within a certain time, which was past before the assignment. 1 Salk. 199: 3 Burr. 1271: 1 Black. Rep. 351. Nor is the assignee to be affected by any covenant broken after he has assigned. 1 Freem. 336.

As the assignee is at law liable only for the rent actually incurred, or covenants broken during his possession, if he assign the very day before the rent becomes due, the lessor cannot maintain his action. Carth. 177: 4 Mod. 71: 3 Co. 22: 1 Salk. 81. Nor will the circumstance of such assignment, being *per fraudum*, as to a beggar, alter the case. Str. 1221.

There are three different kinds of covenants: 1. Such as are called *mutual* and *independant*, where either party may recover damages from the other, for the injury he may have received

received by a breach of the covenants, in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 1 *H. Black.* 273, n. (a) 389: 2 *H. Black.* 1312: 6 *T. Rep.* 570. — 2. There are covenants, which are *conditions* and *dependant*, in which the performance of one depends on the prior performance of another; and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 1 *H. Black.* 270: 2 *Doug.* 688: 1 *T. Rep.* 638: 4 *T. Rep.* 761: 6 *T. Rep.* 665: 8 *T. Rep.* 366. — 3. There are also *concurrent* covenants, which are *mutual conditions*, to be performed at the same time; and, in these, if one party was ready, and offered to perform his, he, who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act; and the dependance or independance of covenants is to be collected from the evident sense and meaning of the parties; and, however they may be transposed in the deed, their precedence must depend on the order of time, in which the intent of the transaction requires the performance. 2 *Doug.* 688, 9.

It is a rule long established in the construction of covenants, that, if any money is to be paid before the thing is done, the covenants are mutual and independant. 2 *H. Black.* 389: 1 *Salk.* 170: 1 *L. Raym.* 662: *Comyn's Rep.* 98: 12 *Mod.* 455: 1 *Saund.* 319.

As to mutual covenants, to be performed at the same time, it may be observed, that the rule laid down is, that, when something is to be performed by each party at the same time, he who was ready, and offered to do his part, may sue the other for not performing his. The party must shew he was ready: but, if the other stops him, on the ground that he will not perform his part, it is not necessary for the first to go farther, and do a nugatory act. If a draught

draught of a deed be shewn to a party, for his approbation of the form, and he will not read it, he who tendered the draught need not go farther. 2 *Doug.* 684.

Where the participle doing, performing, paying, repairing, is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent. 2 *Black. Rep.* 1312: *Sid.* 280.

Where the covenants are mutual and independant, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action for a breach by the defendant; for, the damages may be unequal, and therefore each party must recover against the other the damages he sustained. 1 *Lev.* 16: 3 *Lev.* 41: *Cowp.* 56: 1 *Salk.* 122: 4 *T. Rep.* 761.

And, if there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants, to do, for another thing, and that day happens to occur before the time, the thing for which the promise, agreement, or covenant, is made, is to be performed by the tenor of the agreement; there, though the words be, that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing; after the day is past the other shall have action for the money or other thing, although the thing for which the promise, agreement, or covenant, was made, be not performed; for, it would be repugnant there to make it a condition precedent, and therefore they are, in that case, left to mutual remedies, on which, by the express words of the agreement, they have depended. *Per Holt, Ch. J.*: 12 *Mod.* 461.

Where a covenant goes to the whole of the consideration on both sides, that is a condition precedent; but, where it goes not to the whole, but only to a part, there it is not a condition precedent, and each party must resort to his separate remedy. 1 *H. Black.* 373. n. (a): 2 *H. Black.* 1312.

If one covenant with another to acquit him of all charges issuing out of land, and after, by parliament, the tenth part
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of the *value* (not of the *issues*) of all lands are given to the king, the covenant shall not extend to this; but, if the parliament had given the tenth part of the *issues* of the land, the covenant would have extended to this, as well as to rents, commons, and such like things, wherewith the land is charged. 7 Edw. IV. 6: *Bro. Grant.* 164.

Under an agreement, that a lease shall be made, containing all fair and usual covenants, a covenant not to alien, &c. without consent, is good. 1 *Espin. Rep.* 8.

LEASES RENEWABLE. — See *Tenant-Right*.

COUNTY COURT. — See *Jurisdiction*.

COURTESY. — See *Contract*.

CREDIT. — See *Interest*.

If goods are sold upon any time given as credit, an action cannot be brought before the time is expired; and, if declaration be before, defendant must plead the general issue, and give it in evidence. But, if a person parts with goods upon condition of receiving bills payable at a future day, and he do not receive the bills, the other party being deficient in his part of the contract, an action may be maintained immediately after the expiration of the time agreed upon for the delivery of the bills. And so if the given credit was after the sale. 1 *Espin. Rep.* 430.

But, to bind a tradesman to credit, that credit must be given at the time of the sale; for, if it be voluntary, subsequent to, and not making any part of, the original contract, it may at any time be retracted. 1 *Espin. Rep.* 430.

And, by the custom of LONDON, if a debtor give a bond or other obligation for a debt contracted in the city, payable at a *future day*, and it is suspected that he intends to fly, or withdraw his goods out of the city before the

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day,

day, his body may be arrested for better security on an affidavit of the above facts, confirmed by four citizens, who testify to their belief of the truth of the affidavit. When the debtor is apprehended, he must either go to prison, or find two sureties, who will undertake that he shall be forthcoming on the day of payment, or that they will pay the debt for him: *Emerson*, 63.

CREDITORS. — See *Debtor and Creditor*.

CUSTOMS.

Customs, to be good and valid, must be, 1. *Ancient*, beyond the memory of man. 2. *Continued*, without any interruption of the right. 3. *Peaceable*, and not subject to contention and dispute. 4. *Reasonable*, that is, there must be no legal reason against them. 5. *Certain*, without any doubt. 6. *Compulsory*, and not optional. 7, and lastly. Where there are more than one, they must be *consistent*, and not opposed to each other.

No custom can prevail against an express act of parliament; therefore, a custom that every pound of butter, sold in a certain market, should weigh 18 ounces, is bad, being directly contrary to *Stat. 13 and 14 Car. II. c. 26*, which directs it to contain 16 ounces. 3 *T. Rep.* 271.

CUSTOMS. — See *Excise*.

By the *Stat. 27 Geo. III. c. 31*, all goods, wares, and merchandizes, where any duties are imposed by the *Stat. 27 Geo. III. c. 13*, which shall be unshipped, landed, or delivered, out of any vessel or boat, before the duties are fully paid or secured, shall be forfeited, together with the package, and may be seized. And every person so doing, or aiding or concealing, or receiving, &c. such goods, shall forfeit treble the value.

By

By the 13 and 14 Car. II. c. 11, if any goods shall be laden or taken in from the shore into any barge, &c. to be carried aboard any ship outward bound, or laden or taken in out of any ship coming in from foreign parts, without a warrant and presence of an officer of the Customs, such barge, &c. shall be forfeited, and the wharfinger offending shall forfeit £100, and the master, purser, boatswain, or other mariner, of any ship inward bound, consenting thereto, shall forfeit the value of the goods; half to the king, and half to him that shall sue.

By 8 Anne, c. 13, if foreign goods, specified in any certificate, whereupon any drawback is to be made, or debentures to be made forth for any such drawback, shall not be really and *bonâ fide* shipped and exported, except in case of distress, &c. they shall be forfeited; and persons concerned shall forfeit treble the value of the drawback, and boats, horses, &c.

And, by the same statute, if goods shall be unshipped with intention to be landed without paying customs, or if any prohibited goods shall be imported, they shall be forfeited, and persons concerned shall forfeit treble the value, with boats, &c.

By Stat. 6 Geo. I. c. 21, if goods are stopped, the claimer shall within ten days make such proof before the commissioners, if in the port of London, or before the collector in other ports, as the statute requires; whereupon the goods shall be delivered without delay or charge, with costs; which shall be reckoned a full satisfaction for damages. Sect. 41. But if the proof be satisfactory, and the owner has received any damages by the stop, he may bring his action. Sect. 42.

And the officer, if he please, may prosecute notwithstanding the directions of the commissioners; in which case he shall be liable to be sued by the owners for the recovery of the goods, with full costs; or if the commissioners shall

give no directions for delivery of the goods, the owner may nevertheless sue for them, &c. *See* 43.

If goods and merchandizes are brought by a merchant to a port or haven, and there part thereof sold, but never put on land, they must pay the customs; and discharging them out of the ship into another upon the sale amounts in law to a putting them upon the land; so that, if the custom-duties are not paid, the goods will be forfeited. 12 *Co.* 18.

It was heretofore held, 3 *Will.* 61, that an action of trespass lies against Custom-House officers for entering a house and searching for smuggled goods if none be found. But now, by the *Stat.* 23 *Geo.* III. c. 70, certain regulations are marked out in favour of the officers, which put them in a less perilous situation than heretofore, where there was probable cause of the seizure.

But it has been determined, that a judge's certificate, under the statute that an officer had probable cause for seizing goods, does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs, under the *Statutes* 23 *Geo.* III. c. 70, sect. 29, and 26 *Geo.* III. c. 40, sect. 31: *see* 2 *Esp. Dig.* 339.

DAYS. — *See Calendar, Tender, Time.*

DEAD BODIES.

Stealing dead bodies is an indictable offence. 2 *T. Rep.* 733.

DECEIT.

If a man wickedly assert that which he knows to be false, and thereby draw his neighbour into a loss; as if one promises another to sell goods on credit to one whom he would not otherwise have trusted, by asserting that which he knew to be false, it is actionable. 3 *T. Rep.* 51.

DEBTOR

DEBTOR AND CREDITOR.

An agreement between a debtor and creditor that he will accept a composition cannot be pleaded to an action by a creditor to recover his whole demand. But *Q.* if the debt had been ascertained by the agreement, and a fund provided, and all the creditors bound to forbear? — But if the debtor assigns over all his effects to trustees, to make an equal distribution among all his creditors, that would be a good consideration in law for the promise. *2 T. Rep.* 24. And if the creditor only verbally agrees to accept a composition, and on the faith of it the insolvent assigns fairly, the creditor shall not resort to his action. *1 Espin. Rep.* 236.

Since these cases were before the court, it has been questioned whether even an agreement by creditors to take a composition in discharge of their debts be not binding, though no fund be appropriated for the payment of the composition. *6 T. Rep.* 263.

An assignment by deed by traders of all their effects, unless all the creditors concur, is not only fraudulent and void, as against those creditors who do not concur, but an act of bankruptcy. *8 T. Rep.* 142.

When a creditor agrees to take a composition from his debtor, on the faith of which the debtor executes a deed of assignment of all his property to a trustee for the benefit of his creditors, such creditor shall not be allowed, by refusing to execute such deed, to sue his debtor for the whole of his demand. *1 Espin. Rep.* 236.

It is a general principle, that a secret agreement between the insolvent and some of his creditors, in order to induce the rest of the creditors to agree to a composition, is void. *2 T. Rep.* 763.

An insolvent person assigned over his effects for the benefit of his creditors, and in the deed was a proviso that the

shares of those creditors, who did not execute it before a given day, should be paid to the insolvent. An agreement between the insolvent and a creditor after that day, that the latter should sign that deed, and the former pay the remainder of the whole debt, is fraudulent and void. 4 *T. Rep.* 166 : 2 *T. Rep.* 763. And so is a note obtained before signing for payment of the residue. *Ibid.*

But if a bankrupt or insolvent person, after becoming free from his engagements, voluntarily give security for a former demand, which is only due in conscience, it may be enforced in a court of law. 2 *T. Rep.* 765.

A. executed a deed of composition, in which there was no proviso for making it void, if all the creditors did not come in, and afterwards commenced an action for the debt. Defendant set up the deed of composition; but the court over-ruled the objection, because all the creditors did not come in. Lord Kenyon said, that such a clause ought to be supposed. *East. T. K.B.* 1795.

If a deed of trust be for the benefit of such creditors as shall come in within a year, a creditor will not be excluded, though he come not in till after the year. 1 *Vern.* 260.

A third person, by paying my debt voluntarily, cannot *volens volens* make me his debtor. 1 *T. Rep.* 20.

Creditors shall recover their debts of executors or administrators, who, in their own wrong, waste or convert to their use the estate of the deceased. *Stat.* 30 Car. II. c. 7.

Wills and devises of lands, &c. as to creditors on bonds or other specialties, are declared void; and the creditors may have actions at law against the heir and devisee. 3 and 4 W. and M. c. 14.

And, in favour of creditors, whenever it appears to be the testator's intention in a will that his lands should be liable to the payment of his debts, in such cases, equity will make them liable, though there are not express words; but there must be more than a bare declaration, or it shall be intended

intended out of the personal estate. 2 *Vern. Rep.* 708. Where one devises that all his debts, &c. shall be first paid, if his personal estate is not sufficient to pay the creditors, it shall amount to a charge on the real estate for that purpose. *Preced. Canc.* 430.

Deeds of gift, grant, &c. made with intent to defraud creditors, are void as against such creditors; and gifts made in secret are liable to suspicion of fraud. 13 *Eliz. c. 5*: 3 *Rep.* 80.

Where a debtor owes money to a creditor on several accounts, he may pay part, and apply it to any debt; but if he pay indefinitely, the creditor has his election to which account he will place it. 8 *Mod.* 236.

Where a creditor agrees to accept a composition, and he holds bills of exchange of the insolvent which have some time to run, he may prove them, allowing the rebate. 1 *Espin. Rep.* 131.

A person, though in insolvent circumstances, not having actually committed an act of bankruptcy, may give a preference to one or more creditors by an assignment of a part of his property for a good and *bonâ-fide* consideration; so as such preference be not given in immediate contemplation of a bankruptcy. But in no case can a person in debt, by a voluntary assignment, without a real consideration, deprive his creditors of any part of his property. See 5 *T. Rep.* 235.

DECEIT. — See *Character, Cheat.*

DEL CREDERE COMMISSION

Is an undertaking by an insurance-broker, for an additional premium, to insure his principal against the contingency of the failure of the underwriter, and makes him liable in the first instance, and at all events. 1 *T. Rep.* 112.

DELIVERY. — See *Bills of Sale; Contracts; Stopping Goods in transitu.*

As the want of a transmutation of possession is counted a badge of fraud on a sale of goods, and as certain acts may be a good delivery for some purposes but not for others, it becomes material to consider this subject of delivery, and to point out *what*, in different circumstances, may be considered as a sufficient delivery in law.

A delivery of goods is either *actual* or *constructive*. — An *actual* delivery is a real transmutation of the goods from hand to hand. A *constructive* delivery is a delivery in law, and is admitted as sufficient in cases peculiarly circumstanced; thus there may be cases, where, as between the buyer and seller, if no bankruptcy or insolvency happens, the goods are considered in possession of the buyer the instant they go out of the possession of the seller. As if A. order goods from B. to be sent by a particular carrier at his own risk, the delivery to the carrier is a delivery to the buyer to every other purpose. But still, if he should become a bankrupt before the carrier actually deliver them to him, the seller might probably seize them as *in transitu*,* because it is only a constructive delivery to the buyer; but an actual delivery is necessary to divest the seller's right of stopping them. 3 *T. Rep.* 464.

And, on a question as to the delivery of possession under a bill of sale of ponderous goods, where they were already lying upon the premises of the buyer, it was determined that no farther delivery is necessary; for, it would be absurd to remove the goods from the place where they were lying, since they must have been afterwards brought back to the same spot. 7 *T. Rep.* 67.

A mortgage of a ship at sea is frequently made, is universally recognized, and ought to be encouraged for the

* In their *passage* from the seller to the buyer.

benefit of trade ; but, from the nature of it, no actual delivery of the thing itself can be made at the time of the mortgage ; and, therefore, the delivery of the grand bill of sale amounts to the delivery of the ship itself, and has always been held sufficient to transfer the property. 2 *T. Rep.* 462. For, if the property cannot be delivered at the time of the contract, it will be sufficient if the documents and muniments are delivered, in order to enable the party to reduce the property into possession. 1 *Atk.* 160.

If a ship is in a foreign port, and known to be so by the mortgagee, it is not necessary for him to take possession until her arrival in Great Britain. 1 *Cooke's B. Laws*, 361.

When a share of a ship is mortgaged or pledged, the delivery of a bill of sale of that share is sufficient to establish that security, without the mortgagees taking actual possession of the ship. *Ambl.* 652.

And, where goods are in a warehouse, delivery of the key of the warehouse, if the seller be precluded from legal admission, has been held a sufficient delivery of the goods.

On an undertaking for the delivery of goods, the risk is with the vender ; unless particular directions are given by the vendee. *Cowp.* 294.

DEPOSIT. — See *Auction*.

Where, on a sale, the deposit has been made, it should seem that, if the buyer does not perform the bargain, he shall forfeit the deposit ; which is the rule in equity. For, where, on a sale under a decree, a part of the purchase-money was deposited, and the buyer afterwards refusing to complete the purchase, the seller filed his bill in Chancery to compel the payment of the money and perfect the sale, the court allowed the buyer to forfeit his deposit, and give up all claim to the thing intended to be purchased. 1 *P.*

Wms.

Wms, 745. And it has been often ruled that, where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, if it was for a less number of years than he had contracted to sell, the buyer may consider the contract as at an end, and bring an action for the deposit; and if, upon the mistake being discovered, the seller offer to make an allowance, that makes no difference. It is sufficient for the party to say, "This is not the interest which I agreed to purchase." 2 *Espin. Rep.* 640.

So, where an action was brought to recover back from an auctioneer deposit-money paid on the purchase of an annuity, it was held, that the deposit might be recovered, if the seller do not make out a good title by the time specified in the conditions of sale. *Id.* 641.

But a court of equity will under particular circumstances enlarge the time. *Ibid.*

DEMAND. — See *Request, and Tender.*

Such persons as will re-enter on their tenant should demand the rent at the *house* upon the land, if there be one, (if the payment be not appointed elsewhere by the agreement of the parties,) where the lessor himself or his sufficient attorney, a little before sun-set, in the presence of two or three credible witnesses, shall say, "Here I demand of R. A. £10, due to me at the feast of St. Michael the Archangel, last past, for a messuage, barn, &c. which he holds of me under lease by indenture for the term of twenty-one years, bearing date, &c." and so remain there upon the land the last day on which the rent due ought to be paid, until it be dark, that he cannot see to tell the money. *Noy*, 83: 4 *Rep.* 73.

But, *Note*, the demand must be made at the *fore-door* of the *house*, that being the most notorious place; and it is not material

material whether any person be there or no. And if the lessee be in the house, and the door open, yet he need not go any farther than the fore-door. And, if wood only be leased, the demand must be at the gate of the wood. 1 *Inst.* 201: *Poph.* 58; see *Dier*, 51; *Leqn.* 425; *Cro. Eliz.* 209.

If there be no house, the demand must be at the *most notorious place of the land*, as at some *highway* leading through the same; for, if it be either at the back-door of the house, or some obscure place of the ground, it is void, and the lessor shall not take advantage by such demand, *Dier*, 329.

If the rent be reserved to be paid at any place off the land, the lessor must demand it at the place appointed, observing the rules aforesaid of the most notorious place. *And.* 125.

But if the lessee come to the lessor, at any place on the ground, at the day of payment, and tender his rent to him, it is good, and shall save the condition, and the lessor is bound to receive it, although it were not at the most notorious place, nor last instant of the day; for, he may tender it (to the *person* of the lessor) at any time of the day, though the last instant be the legal time of payment. *Hern.* 29.

See *Poph.* 58, where, upon a lease of two barns, the lessor demanded at one, and the lessee tendered at the other, and it was held to be a good tender to save the re-entry.

A demand in trover is merely for the purpose of giving the defendant an opportunity of either restoring the goods in specie, or of making a satisfaction to the party to whom they belonged; and in this case a demand of *satisfaction* is good. *Clayt.* 122: 1 *Espin. Rep.* 33.

But the demand must be made by one properly authorized to receive the goods; and, therefore, a demand by an attorney's clerk, by his master's directions, is not sufficient.

1 *Espin.*

1 *Espin. Rep.* 115. But it would seem that a demand in writing by the attorney himself is sufficient. *Id.* 31. And, where the demand is not made by the party himself, it is not a sufficient refusal, if the defendant object on the ground that the party applying is unknown, or has a doubtful authority, &c. *Id.* 83.

DEMURRAGE.

In an action of covenant for demurrage on a charter-party, given "while waiting at *Portsmouth* for convoy, and "discharging her cargo at *Barcelona*," the plaintiff can only claim demurrage at those two places, whatever other necessary intervening delays there may have been in waiting for convoy in the course of the voyage. 1 *Espin. Rep.* 368.

DESCENTS.

Estates of inheritance descend, 1. To the eldest son, or his child or grandchild. 2. Next son. 3. Daughters equally. 4. Eldest brother. 5. Next brother. 6. Sisters equally. 7. Uncles. 8. Aunts equally. None can succeed to real estates but relations of the *whole* blood.

If a person has a son and daughter by one wife, and a son by a second, and dieth seized, and his son by the first wife entereth and dieth, the daughter of the first wife shall inherit as heir to her brother, and not the son of the second wife, as heir to the father. *Coke's Copyh.* 113. But, if the son by the first wife dies before entry, the younger son will inherit, as heir to the father. *Ibid.*

And, although the estate will rather escheat than ascend from the son to the father, yet a case may happen, where the father may succeed to the son's estate: *i. e.* if an estate passes from the son to his uncle, and the uncle dies without issue,

issue, the father living, the father may inherit as heir to the uncle.

DETAINDER. — See *Lien*.

DISCOUNT.

Discount of a sum of money is the allowance of interest upon prompt payment of a sum payable at a future day. But, in the computation of discount, a different method must be employed than that used in the computation of interest. For instance, if £100 be payable at twelve months hence, the whole £5 (or interest for £100 for a year) must not be allowed for discount, as you would in the case of interest; for, it is to be remarked that, if the whole £5 were allowed, that would be the interest of £100; but as, in the case of discount, you are not to receive £100, but the difference between that and the amount of the discount, it is deemed the most equitable, and indeed the most legal, way to take the interest only of the sum to be received, after deducting the discount; of course it must be reckoned on £95 only. See *USURY*.

If a banker discounts bills with money, and other bills, and notes, but does not indorse them, here the party taking them without indorsement takes the risk on himself. By not indorsing them, the banker refuses to pledge his credit to their validity. 1 *Espin. Rep.* 448.

DISTRESS.

One cannot distrain the same day the rent becomes due. *Co. Lit.* 47.

And distresses for rent must be made in the day-time; but, for doing damage, (*damage feasant*,) they may be made in the night. 3 *Black. Com.* 11.

Things

Things not distrainable are tools of a man's trade, corn sent to a mill, a horse in a smith's shop or in a common inn, cloth at a tailor's, goods in the hands of a carrier. 1 *Salk.* 249: 1 *Espin. Rep.* 206: 4 *T. Rep.* 569. Dogs, cats, rabbits, beasts of the plough, milk, fruit, and things fixed to the freehold. 3 *Black. Com.* 8, 9: 4 *T. Rep.* 569. But beasts of the plough and working-tools, if not actually in use at the time, may be distrained, if there is not sufficient without them. 4 *T. Rep.* 565.

So may wearing-apparel not actually in use. 1 *Espin. Rep.* 206.

Goods, cattle (not of the plough), sheaves of corn, corn in the straw or threshed, and carts with corn, (but not victuals,) hay in a barn or rick, money in a bag sealed (though not out of a bag), may be distrained; and so may cattle or goods driving to market, if put into a pasture by the way. *Stat.* 2 W. and M. 5: *Co. Lit.* 47: 1 *Lutw.* 214: *Mod.* 385. And so may beasts, which escape into the tenant's ground by default of the owner, as by breaking the fences; and that, in this case, without being levant or couchant. But, if they escape there by default of the tenant of the land, then they are privileged till they have been levant and couchant; nor even then by a landlord for rent on a lease, unless, on notice, the owner of the beasts neglects to remove them. 2 *Lutw.* 1573.

And, by the *Stat.* 11 Geo. II. c. 19, corn, grass, or other product, growing, may be distrained, and cut and gathered when ripe.

Horses or cattle sent to agist may be immediately distrained by the landlord for rent in arrear, and the owner must seek his remedy by action against the farmer. And the principle of this law extends to public livery-stables; to which, if horses and carriages are sent to stand, it is determined that they are distrainable by the landlord, as if they were upon any other farm. 3 *Burr.* 1498.

A landlord may distrain his tenant's cattle, feeding on commons or wastes appendant or appurtenant to the land.

3 *Black. Com.* 11.

A horse cannot be distrained for rent while a man is riding on him; but for *damage feasant* he may. *Id.* 8. Notwithstanding this declaration of the learned commentator, it seems to be the better opinion, that there is not any case to warrant the distress of a horse while the rider is on him. See *Harg. Co. Lit.* 47. And, accordingly, it has since been determined, that a horse cannot be distrained *damage feasant*, if there be a rider on him. *Storey v. Robinson*, *Hil.* 35 Geo. III.: 6 *T. Rep.* 138.

Whether the goods be the property of the tenant or of a stranger is perfectly immaterial, provided they are on the premises, and are not privileged by the law. 3 *Black. Com.* 8.

Parole authority to distrain is sufficient, or any authority that can be proved.

By the 11 Geo. II. c. 19, landlords may, by the assistance of a peace-officer of the parish, break open in the day-time any place where goods are fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

In making a distress, if a trespass be unwittingly committed, it will be prudent to make a tender of sufficient damages immediately. 2 *Black. Com.* 15.

If things, taken in distress, be sold at the appraised price, the law will intend that they are sold at the best price.

1 *Raym.* 55.

Rent accruing due under a lease must be distrained for within six months after its determination. *Stat.* 8 Anne, c. 14.

A notice of distress left upon the premises with some person there is sufficient. If there are several claimants in the house,

house, as the tenant, a messenger under a commission, and the sheriff under an execution, the notice may be directed to the tenant, and all other persons whom it may concern, and a copy may be delivered to each.

Where there is a distress upon goods in the custody of a messenger, and no assignees are chosen, it does not appear that there is any body competent to give consent for the goods to remain upon the premises beyond the time allowed by law.

Goods taken in distress must be removed off the premises on the sixth day. Thus, on a distress made on a Saturday, the goods must be removed on the Thursday. Saturday, 1; Sunday, 2; Monday, 3; Tuesday, 4; Wednesday, 5; Thursday, 6. Having removed them, give notice where they are deposited, and then they may (if the accommodation of the parties requires it) be kept for a few days longer; but, till sold, they are liable to be replevied. They may be sold on the Thursday.

If a replevyn-bond be entered into, the goods cannot afterwards be sold; search should therefore be made at the sheriff's office previous to the sale.

Distresses *damage feasant*, and for suit and services, must remain impounded till the owner makes satisfaction. But a distress for an amerciamment by a court-leet may be sold.

3 *Black. Com.* 13.

Executors of tenant for life cannot distrain, but must bring an action on the case under the *Stat. 11 Geo. II. c. 19, sect. 15.*

By the *Stat. 11 Geo. II. c. 19*, if a tenant fraudulently removes goods off the premises, the landlord may within thirty days seize them. But such seizure can only be made where the rent was actually due before the removal.

By the *Stat. 11 Geo. II. c. 19, sect. 10*, persons distraining for rent may impound the distress on any convenient part of the land, chargeable with the distress.

Otherwise the goods must be removed to a pound covert, and notice given where they are, unless the tenant consent to a *person* remaining in possession on the premises. *Wood's Inst.* 191.

DISTRIBUTION. — See *Consanguinity*.

In the distribution of personal estates, the females of equal degree are admitted together with the males; and no right of primogeniture is allowed.

The husband has a right not only to administer, but also to enjoy exclusively the effects of his deceased wife.

By *Stat.* 22 and 23 Car. II. c. 10, the surplusage of intestate's estates, except of *femes-covert*, shall (after the expiration of one full year from the death of the intestate) be distributed as follows, one-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; *i. e.* to their lineal descendants. If there are no children, or legal representatives of them subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives. If no widow, the whole shall go to the children. If neither widow nor children, the whole shall be distributed to the next of kin in equal degree and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters.

The next of kindred are to be investigated by the same rules of consanguinity as those who are entitled to *administration*, [which see,] and, therefore, by the statute, the mother as well as the father succeeds to all the personal estate of their children, who died intestate, and without issue or wife, in exclusion of the other sons and daughters, the brothers and sisters of the deceased; and so the law still remains with respect to the father. But, by the *Stat.* 1 Jac. II. c. 17, if

the father be dead, and any of the children die intestate and without wife or issue, in the life-time of the mother, she, and the remaining children, or their representatives, shall divide his effects in equal portions; *i. e.* the mother, every brother and sister, and their representatives, shall have an equal share with her. 2 *N. Abr.* 428, 429.

No child of the intestate, (except his heir at law,) upon whom he settled in his life-time any estate of lands or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates, so given them by way of advancement, are not equivalent to the other shares, the children so advanced shall now have so much as will render them equal. 2 *Black. Com.* 516.

After children, come brothers, grandfathers, uncles, or nephews, and the females of each class, and cousins.

When all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, (in right of another person,) the property is divided *per capita* :* in the other case, *per stirpes*.* As if the next of kin be the intestate's three brothers, A. B. and C. ; here the effects are divided into three equal portions, and distributed *per capita*, one to each. But, if one of these brothers, A. had been dead, leaving three children; and another, B. leaving two; then the distribution must be *per stirpes*; viz. one-third to A.'s three children, another third to B.'s two children, and the remaining third to C. the surviving brother. Yet, if C. had also been dead without issue, then A. and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one-fifth part. 3 *Black. Com.* 517.

* *Per capita*, by HEADS, or in their own right: — *per stirpes*, by ROOTS, or as claiming among them the share of another, in virtue of their representation of such other person.

DIVIDENDS.

TABLE for calculating Dividends of the Estates of Bankrupts and Insolvent Persons.

[illegible]

Note. — The dividend on any sum from 10*s.* up to £1 inclusive is found out by one addition, thus: 7*d.* in the pound on 17*s.* amounts to 6*d.* viz. on 9*s.* — 3½*d.*
on 8*s.* — 2½*d.*

6d.

Again: — A dividend of 10*s.* in the pound on 19*s.*
amounts to 9*s.* 6*d.* viz. on 10*s.* — 5*s.* 0*d.*
on 9*s.* — 4*s.* 6*d.*

9s. 6d.

Div.	L. s. 4 10			L. 4			L. s. 3 10			L. 3			L. s. 2 10			L. 2			L. s. 1 10			L. 1		
s. d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.
0 0	0	0	1	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 0	0	0	2	0	0	2	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 0	0	0	3	0	0	3	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 1	0	0	4	0	0	4	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 2	0	0	5	0	0	5	0	0	5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 3	0	0	6	0	0	6	0	0	6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 4	0	0	7	0	0	7	0	0	7	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 5	0	0	8	0	0	8	0	0	8	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 6	0	0	9	0	0	9	0	0	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 7	0	0	10	0	0	10	0	0	10	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 8	0	0	11	0	0	11	0	0	11	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 9	0	0	12	0	0	12	0	0	12	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 10	0	0	13	0	0	13	0	0	13	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0 11	0	0	14	0	0	14	0	0	14	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1 0	0	0	15	0	0	15	0	0	15	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 0	0	0	16	0	0	16	0	0	16	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 0	0	0	17	0	0	17	0	0	17	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4 0	0	0	18	0	0	18	0	0	18	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 0	0	0	19	0	0	19	0	0	19	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6 0	0	0	20	0	0	20	0	0	20	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7 0	0	0	21	0	0	21	0	0	21	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8 0	0	0	22	0	0	22	0	0	22	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9 0	0	0	23	0	0	23	0	0	23	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10 0	0	0	24	0	0	24	0	0	24	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
11 0	0	0	25	0	0	25	0	0	25	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12 0	0	0	26	0	0	26	0	0	26	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Div.	L. s. 8 10			L. 8			L. s. 7 10			L. 7			L. s. 6 10			L. 6			L. s. 5 10			L. 5		
s. d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.
0 0	0	0	2	0	0	2	0	0	2	0	0	2	0	0	2	0	0	2	0	0	2	0	0	2
0 0	0	0	4	0	0	4	0	0	4	0	0	4	0	0	4	0	0	4	0	0	4	0	0	4
0 0	0	0	6	0	0	6	0	0	6	0	0	6	0	0	6	0	0	6	0	0	6	0	0	6
0 1	0	0	8	0	0	8	0	0	8	0	0	8	0	0	8	0	0	8	0	0	8	0	0	8
0 2	0	0	10	0	0	10	0	0	10	0	0	10	0	0	10	0	0	10	0	0	10	0	0	10
0 3	0	0	12	0	0	12	0	0	12	0	0	12	0	0	12	0	0	12	0	0	12	0	0	12
0 4	0	0	14	0	0	14	0	0	14	0	0	14	0	0	14	0	0	14	0	0	14	0	0	14
0 5	0	0	16	0	0	16	0	0	16	0	0	16	0	0	16	0	0	16	0	0	16	0	0	16
0 6	0	0	18	0	0	18	0	0	18	0	0	18	0	0	18	0	0	18	0	0	18	0	0	18
0 7	0	0	20	0	0	20	0	0	20	0	0	20	0	0	20	0	0	20	0	0	20	0	0	20
0 8	0	0	22	0	0	22	0	0	22	0	0	22	0	0	22	0	0	22	0	0	22	0	0	22
0 9	0	0	24	0	0	24	0	0	24	0	0	24	0	0	24	0	0	24	0	0	24	0	0	24
0 10	0	0	26	0	0	26	0	0	26	0	0	26	0	0	26	0	0	26	0	0	26	0	0	26
0 11	0	0	28	0	0	28	0	0	28	0	0	28	0	0	28	0	0	28	0	0	28	0	0	28
1 0	0	0	30	0	0	30	0	0	30	0	0	30	0	0	30	0	0	30	0	0	30	0	0	30
2 0	0	0	32	0	0	32	0	0	32	0	0	32	0	0	32	0	0	32	0	0	32	0	0	32
3 0	0	0	34	0	0	34	0	0	34	0	0	34	0	0	34	0	0	34	0	0	34	0	0	34
4 0	0	0	36	0	0	36	0	0	36	0	0	36	0	0	36	0	0	36	0	0	36	0	0	36
5 0	0	0	38	0	0	38	0	0	38	0	0	38	0	0	38	0	0	38	0	0	38	0	0	38
6 0	0	0	40	0	0	40	0	0	40	0	0	40	0	0	40	0	0	40	0	0	40	0	0	40
7 0	0	0	42	0	0	42	0	0	42	0	0	42	0	0	42	0	0	42	0	0	42	0	0	42
8 0	0	0	44	0	0	44	0	0	44	0	0	44	0	0	44	0	0	44	0	0	44	0	0	44
9 0	0	0	46	0	0	46	0	0	46	0	0	46	0	0	46	0	0	46	0	0	46	0	0	46
10 0	0	0	48	0	0	48	0	0	48	0	0	48	0	0	48	0	0	48	0	0	48	0	0	48
11 0	0	0	50	0	0	50	0	0	50	0	0	50	0	0	50	0	0	50	0	0	50	0	0	50
12 0	0	0	52	0	0	52	0	0	52	0	0	52	0	0	52	0	0	52	0	0	52	0	0	52

Div.			L. 40			L. 30			L. 20			L. 10			L. 9		
s.	d.		L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.	L.	s.	d.
0	0	1	0	0	10	0	0	7½	0	0	5	0	0	2½	0	0	2½
0	0	0	0	1	8	0	0	1	3	0	0	0	0	5	0	0	4½
0	0	0	0	2	6	0	0	1	10½	0	0	1	3	0	0	0	6½
0	0	0	0	3	4	0	0	2	6	0	0	1	8	0	0	0	9
0	0	1	0	0	6	0	0	5	0	0	0	3	4	0	0	1	6
0	0	2	0	0	8	0	0	7	6	0	0	5	0	2	6	0	2
0	0	3	0	0	10	0	0	10	0	0	0	6	8	0	3	4	0
0	0	4	0	0	13	0	0	12	6	0	0	8	4	0	4	2	0
0	0	5	0	0	16	0	0	15	0	0	0	10	0	0	5	0	4
0	0	6	1	0	0	0	0	17	6	0	0	11	8	0	5	10	0
0	0	7	1	3	4	0	0	15	0	0	0	13	4	0	6	8	0
0	0	8	1	6	8	1	0	0	0	0	0	15	0	0	7	6	0
0	0	9	1	10	0	1	2	6	0	0	0	16	8	0	8	4	0
0	0	10	1	13	4	1	5	0	0	0	0	18	4	0	9	2	0
0	0	11	1	16	8	1	7	6	0	0	0	0	0	10	0	0	0
1	0	0	2	0	0	1	10	0	0	1	0	0	0	1	0	0	0
1	0	2	4	0	0	2	0	0	0	2	0	0	1	10	0	1	7
1	0	3	6	0	0	4	10	0	0	3	0	0	2	0	0	1	16
1	0	4	8	0	0	6	0	0	0	4	0	0	2	10	0	2	5
1	0	5	10	0	0	7	10	0	0	5	0	0	3	0	0	2	14
1	0	6	12	0	0	9	0	0	0	6	0	0	3	10	0	3	3
1	0	7	14	0	0	10	10	0	0	7	0	0	4	0	0	3	12
1	0	8	16	0	0	12	0	0	0	8	0	0	4	0	0	4	1
1	0	9	18	0	0	13	10	0	0	9	0	0	4	10	0	4	10
1	0	10	20	0	0	15	0	0	0	10	0	0	5	0	0	4	19
1	0	11	22	0	0	16	10	0	0	11	0	0	5	10	0	4	8
1	0	12	24	0	0	18	0	0	0	12	0	0	6	0	0	5	0

Div.		60		50		40		30		20		10	
s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
0	0	0	1	0	1	0	1	0	1	0	1	0	1
0	1	0	2	0	2	0	2	0	2	0	2	0	2
0	2	0	3	0	3	0	3	0	3	0	3	0	3
0	3	0	4	0	4	0	4	0	4	0	4	0	4
0	4	0	5	0	5	0	5	0	5	0	5	0	5
0	5	0	6	0	6	0	6	0	6	0	6	0	6
0	6	0	7	0	7	0	7	0	7	0	7	0	7
0	7	0	8	0	8	0	8	0	8	0	8	0	8
0	8	0	9	0	9	0	9	0	9	0	9	0	9
0	9	0	10	0	10	0	10	0	10	0	10	0	10
0	10	0	11	0	11	0	11	0	11	0	11	0	11
0	11	0	12	0	12	0	12	0	12	0	12	0	12
0	12	0	13	0	13	0	13	0	13	0	13	0	13
0	13	0	14	0	14	0	14	0	14	0	14	0	14
0	14	0	15	0	15	0	15	0	15	0	15	0	15
0	15	0	16	0	16	0	16	0	16	0	16	0	16
0	16	0	17	0	17	0	17	0	17	0	17	0	17
0	17	0	18	0	18	0	18	0	18	0	18	0	18
0	18	0	19	0	19	0	19	0	19	0	19	0	19
0	19	0	20	0	20	0	20	0	20	0	20	0	20
0	20	0	21	0	21	0	21	0	21	0	21	0	21
0	21	0	22	0	22	0	22	0	22	0	22	0	22
0	22	0	23	0	23	0	23	0	23	0	23	0	23
0	23	0	24	0	24	0	24	0	24	0	24	0	24
0	24	0	25	0	25	0	25	0	25	0	25	0	25
0	25	0	26	0	26	0	26	0	26	0	26	0	26
0	26	0	27	0	27	0	27	0	27	0	27	0	27
0	27	0	28	0	28	0	28	0	28	0	28	0	28
0	28	0	29	0	29	0	29	0	29	0	29	0	29
0	29	0	30	0	30	0	30	0	30	0	30	0	30
0	30	0	31	0	31	0	31	0	31	0	31	0	31
0	31	0	32	0	32	0	32	0	32	0	32	0	32
0	32	0	33	0	33	0	33	0	33	0	33	0	33
0	33	0	34	0	34	0	34	0	34	0	34	0	34
0	34	0	35	0	35	0	35	0	35	0	35	0	35
0	35	0	36	0	36	0	36	0	36	0	36	0	36
0	36	0	37	0	37	0	37	0	37	0	37	0	37
0	37	0	38	0	38	0	38	0	38	0	38	0	38
0	38	0	39	0	39	0	39	0	39	0	39	0	39
0	39	0	40	0	40	0	40	0	40	0	40	0	40
0	40	0	41	0	41	0	41	0	41	0	41	0	41
0	41	0	42	0	42	0	42	0	42	0	42	0	42

Div.	£. 1000	£. 500	£. 400	£. 300	£. 200	£. 100
s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
0 0 1	1 0 10	0 10 5	0 8 4	0 6 3	0 4 2	0 2 1
0 0 2	2 1 8	1 0 10	0 16 8	0 12 6	0 8 4	0 4 2
0 0 3	3 2 6	1 11 3	1 5 0	0 18 0	0 12 6	0 6 3
0 0 4	4 3 4	2 1 8	1 13 4	1 5 0	0 16 8	0 8 4
0 0 5	5 4 2	2 2 6	2 1 8	2 10 0	1 13 4	0 16 8
0 0 6	6 5 0	3 3 4	3 6 8	3 15 0	2 10 0	1 5 0
0 0 7	7 6 8	4 4 2	4 8 4	4 20 0	3 6 8	1 13 4
0 0 8	8 7 6	5 5 0	5 10 0	5 25 0	4 8 4	2 1 8
0 0 9	9 8 4	6 5 0	6 16 8	6 30 0	5 16 8	2 18 4
0 0 10	10 9 2	7 6 8	7 24 0	7 35 0	6 24 0	3 6 8
0 0 11	11 10 0	8 7 6	8 32 0	8 40 0	7 32 0	4 11 8
0 0 12	12 10 0	9 8 4	9 40 0	9 45 0	8 40 0	5 0 0
1 0 0	13 11 3	10 9 2	10 48 0	10 50 0	9 48 0	6 0 0
1 0 1	14 12 1	11 10 0	11 56 0	11 55 0	10 56 0	7 0 0
1 0 2	15 12 10	12 11 3	12 64 0	12 60 0	11 64 0	8 0 0
1 0 3	16 13 8	13 12 1	13 72 0	13 65 0	12 72 0	9 0 0
1 0 4	17 14 6	14 13 0	14 80 0	14 70 0	13 80 0	10 0 0
1 0 5	18 15 4	15 14 0	15 88 0	15 75 0	14 88 0	11 0 0
1 0 6	19 16 2	16 15 0	16 96 0	16 80 0	15 96 0	12 0 0
1 0 7	20 17 0	17 16 0	17 104 0	17 85 0	16 104 0	13 0 0
1 0 8	21 17 10	18 17 0	18 112 0	18 90 0	17 112 0	14 0 0
1 0 9	22 18 8	19 18 0	19 120 0	19 95 0	18 120 0	15 0 0
1 0 10	23 19 6	20 19 0	20 128 0	20 100 0	19 128 0	16 0 0
1 0 11	24 20 4	21 20 0	21 136 0	21 105 0	20 136 0	17 0 0
1 0 12	25 21 2	22 21 0	22 144 0	22 110 0	21 144 0	18 0 0
2 0 0	26 22 0	23 22 0	23 152 0	23 115 0	22 152 0	19 0 0
2 0 1	27 22 10	24 23 0	24 160 0	24 120 0	23 160 0	20 0 0
2 0 2	28 23 8	25 24 0	25 168 0	25 125 0	24 168 0	21 0 0
2 0 3	29 24 6	26 25 0	26 176 0	26 130 0	25 176 0	22 0 0
2 0 4	30 25 4	27 26 0	27 184 0	27 135 0	26 184 0	23 0 0
2 0 5	31 26 2	28 27 0	28 192 0	28 140 0	27 192 0	24 0 0
2 0 6	32 27 0	29 28 0	29 200 0	29 145 0	28 200 0	25 0 0
2 0 7	33 27 10	30 29 0	30 208 0	30 150 0	29 208 0	26 0 0
2 0 8	34 28 8	31 30 0	31 216 0	31 155 0	30 216 0	27 0 0
2 0 9	35 29 6	32 31 0	32 224 0	32 160 0	31 224 0	28 0 0
2 0 10	36 30 4	33 32 0	33 232 0	33 165 0	32 232 0	29 0 0
2 0 11	37 31 2	34 33 0	34 240 0	34 170 0	33 240 0	30 0 0
2 0 12	38 32 0	35 34 0	35 248 0	35 175 0	34 248 0	31 0 0
3 0 0	39 32 10	36 35 0	36 256 0	36 180 0	35 256 0	32 0 0
3 0 1	40 33 8	37 36 0	37 264 0	37 185 0	36 264 0	33 0 0
3 0 2	41 34 6	38 37 0	38 272 0	38 190 0	37 272 0	34 0 0
3 0 3	42 35 4	39 38 0	39 280 0	39 195 0	38 280 0	35 0 0
3 0 4	43 36 2	40 39 0	40 288 0	40 200 0	39 288 0	36 0 0
3 0 5	44 37 0	41 40 0	41 296 0	41 205 0	40 296 0	37 0 0
3 0 6	45 37 10	42 41 0	42 304 0	42 210 0	41 304 0	38 0 0
3 0 7	46 38 8	43 42 0	43 312 0	43 215 0	42 312 0	39 0 0
3 0 8	47 39 6	44 43 0	44 320 0	44 220 0	43 320 0	40 0 0
3 0 9	48 40 4	45 44 0	45 328 0	45 225 0	44 328 0	41 0 0
3 0 10	49 41 2	46 45 0	46 336 0	46 230 0	45 336 0	42 0 0
3 0 11	50 42 0	47 46 0	47 344 0	47 235 0	46 344 0	43 0 0
3 0 12	51 42 10	48 47 0	48 352 0	48 240 0	47 352 0	44 0 0
4 0 0	52 43 8	49 48 0	49 360 0	49 245 0	48 360 0	45 0 0
4 0 1	53 44 6	50 49 0	50 368 0	50 250 0	49 368 0	46 0 0
4 0 2	54 45 4	51 50 0	51 376 0	51 255 0	50 376 0	47 0 0
4 0 3	55 46 2	52 51 0	52 384 0	52 260 0	51 384 0	48 0 0
4 0 4	56 47 0	53 52 0	53 392 0	53 265 0	52 392 0	49 0 0
4 0 5	57 47 10	54 53 0	54 400 0	54 270 0	53 400 0	50 0 0
4 0 6	58 48 8	55 54 0	55 408 0	55 275 0	54 408 0	51 0 0
4 0 7	59 49 6	56 55 0	56 416 0	56 280 0	55 416 0	52 0 0
4 0 8	60 50 4	57 56 0	57 424 0	57 285 0	56 424 0	53 0 0
4 0 9	61 51 2	58 57 0	58 432 0	58 290 0	57 432 0	54 0 0
4 0 10	62 52 0	59 58 0	59 440 0	59 295 0	58 440 0	55 0 0
4 0 11	63 52 10	60 59 0	60 448 0	60 300 0	59 448 0	56 0 0
4 0 12	64 53 8	61 60 0	61 456 0	61 305 0	60 456 0	57 0 0
5 0 0	65 54 6	62 61 0	62 464 0	62 310 0	61 464 0	58 0 0
5 0 1	66 55 4	63 62 0	63 472 0	63 315 0	62 472 0	59 0 0
5 0 2	67 56 2	64 63 0	64 480 0	64 320 0	63 480 0	60 0 0
5 0 3	68 57 0	65 64 0	65 488 0	65 325 0	64 488 0	61 0 0
5 0 4	69 57 10	66 65 0	66 496 0	66 330 0	65 496 0	62 0 0
5 0 5	70 58 8	67 66 0	67 504 0	67 335 0	66 504 0	63 0 0
5 0 6	71 59 6	68 67 0	68 512 0	68 340 0	67 512 0	64 0 0
5 0 7	72 60 4	69 68 0	69 520 0	69 345 0	68 520 0	65 0 0
5 0 8	73 61 2	70 69 0	70 528 0	70 350 0	69 528 0	66 0 0
5 0 9	74 62 0	71 70 0	71 536 0	71 355 0	70 536 0	67 0 0
5 0 10	75 62 10	72 71 0	72 544 0	72 360 0	71 544 0	68 0 0
5 0 11	76 63 8	73 72 0	73 552 0	73 365 0	72 552 0	69 0 0
5 0 12	77 64 6	74 73 0	74 560 0	74 370 0	73 560 0	70 0 0
6 0 0	78 65 4	75 74 0	75 568 0	75 375 0	74 568 0	71 0 0
6 0 1	79 66 2	76 75 0	76 576 0	76 380 0	75 576 0	72 0 0
6 0 2	80 67 0	77 76 0	77 584 0	77 385 0	76 584 0	73 0 0
6 0 3	81 67 10	78 77 0	78 592 0	78 390 0	77 592 0	74 0 0
6 0 4	82 68 8	79 78 0	79 600 0	79 395 0	78 600 0	75 0 0
6 0 5	83 69 6	80 79 0	80 608 0	80 400 0	79 608 0	76 0 0
6 0 6	84 70 4	81 80 0	81 616 0	81 405 0	80 616 0	77 0 0
6 0 7	85 71 2	82 81 0	82 624 0	82 410 0	81 624 0	78 0 0
6 0 8	86 72 0	83 82 0	83 632 0	83 415 0	82 632 0	79 0 0
6 0 9	87 72 10	84 83 0	84 640 0	84 420 0	83 640 0	80 0 0
6 0 10	88 73 8	85 84 0	85 648 0	85 425 0	84 648 0	81 0 0
6 0 11	89 74 6	86 85 0	86 656 0	86 430 0	85 656 0	82 0 0
6 0 12	90 75 4	87 86 0	87 664 0	87 435 0	86 664 0	83 0 0
7 0 0	91 76 2	88 87 0	88 672 0	88 440 0	87 672 0	84 0 0
7 0 1	92 77 0	89 88 0	89 680 0	89 445 0	88 680 0	85 0 0
7 0 2	93 77 10	90 89 0	90 688 0	90 450 0	89 688 0	86 0 0
7 0 3	94 78 8	91 90 0	91 696 0	91 455 0	90 696 0	87 0 0
7 0 4	95 79 6	92 91 0	92 704 0	92 460 0	91 704 0	88 0 0
7 0 5	96 80 4	93 92 0	93 712 0	93 465 0	92 712 0	89 0 0
7 0 6	97 81 2	94 93 0	94 720 0	94 470 0	93 720 0	90 0 0
7 0 7	98 82 0	95 94 0	95 728 0	95 475 0	94 728 0	91 0 0
7 0 8	99 82 10	96 95 0	96 736 0	96 480 0	95 736 0	92 0 0
7 0 9	100 83 8	97 96 0	97 744 0	97 485 0	96 744 0	93 0 0
7 0 10	101 84 6	98 97 0	98 752 0	98 490 0	97 752 0	94 0 0
7 0 11	102 85 4	99 98 0	99 760 0	99 495 0	98 760 0	95 0 0
7 0 12	103 86 2	100 99 0	100 768 0	100 500 0	99 768 0	96 0 0
8 0 0	104 87 0	101 100 0	101 776 0	101 505 0	100 776 0	97 0 0
8 0 1	105 87 10	102 101 0	102 784 0	102 510 0	101 784 0	98 0 0
8 0 2	106 88 8	103 102 0	103 792 0	103 515 0	102 792 0	99 0 0
8 0 3	107 89 6	104 103 0	104 800 0	104 520 0	103 800 0	100 0 0
8 0 4	108 90 4	105 104 0	105 808 0	105 525 0	104 808 0	101 0 0
8 0 5	109 91 2	106 105 0	106 816 0	106 530 0	105 816 0	102 0 0
8 0 6	110 92 0	107 106 0	107 824 0	107 535 0	106 824 0	103 0 0
8 0 7	111 92 10	108 107 0	108 832 0	108 540 0	107 832 0	104 0 0
8 0 8	112 93 8	109 108 0	109 840 0	109 545 0	108 840 0	105 0 0
8 0 9	113 94 6	110 109 0	110 848 0	110 550 0	109 848 0	106 0 0
8 0 10	114 95 4	111 110 0	111 856 0	111 555 0	110 856 0	107 0 0
8 0 11	115 96 2	112 111 0	112 864 0	112 560 0	111 864 0	108 0 0
8 0 12	116 97 0	113 112 0	113 872 0	113 565 0	112 872 0	109 0 0
9 0 0	117 97 10	114 113 0	114 880 0	114 570 0	113 880 0	110 0 0
9 0 1	118 98 8	115 114 0	115 888 0	115 575 0	114 888 0	111 0 0
9 0 2	119 99 6	116 115 0	116 896 0	116 580 0	115 896 0	112 0 0
9 0 3	120 100 4	117 116 0	117 904 0	117 585 0	116 904 0	113 0 0
9 0 4	121 101 2	118 117 0	118 912 0	118 590 0	117 912 0	114 0 0
9 0 5	122 102 0	119 118 0	119 920 0	119 595 0	118 920 0	115 0 0
9 0 6	123 102 10	120 119 0	120 928 0	120 600 0	119 928 0	116 0 0
9 0 7	124 103 8	121 120 0	121 936 0	121 605 0	120 936 0	117 0 0
9 0 8	125 104 6	122 121 0	122 944 0	122 610 0	121 944 0	118 0 0
9 0 9	126 105 4	123 122 0	123 952 0	123 615 0	122 952 0	119 0 0
9 0 10	127 106 2	124 123 0	124 960 0	124 620 0	123 960 0	120 0 0
9 0 11	128 107 0	125 124 0	125 968 0	125 625 0	124 968 0	121 0 0
9 0 12	129 107 10	126 125 0	126 976 0	126 630 0	125 976 0	122 0 0
10 0 0	130 108 8	127 126 0	127 984 0	127 635 0	126 984 0	123 0 0
10 0 1	131 109 6	128 127 0	128 992 0	128 640 0	127 992 0	124 0 0
10 0 2	132 110 4	129 128 0	129 1000 0	129 645 0	128 1000 0	125 0 0
10 0 3	133 111 2	130 129 0	130 1008 0	130 650 0	129 1008 0	126 0 0
10 0 4	134 112 0	131 130 0	131 1016 0	131 655 0	130 1016 0	127 0 0
10 0 5	135 112 10	132 131 0	132 1024 0	132 660 0	131 1024 0	128 0 0</

DOG.

A lost dog may be recovered by an action of trover, without paying the expenses of his keep. 1 *Black. Rep.* 1117.

To an action of trespass, for killing plaintiff's dog, the defendant may plead, that the dog chased the coney in his warren or the deer in his park; but not that he chased a hare into defendant's land. He may also plead that plaintiff's *mastiff* came into the defendant's court, to the terror of his family, and therefore he killed it; or fastened upon his dog, and that he could not otherwise part them. 2 *Morg.* 265.

An action will lie for keeping a dog *accustomed* to bite sheep, and which has killed sheep belonging to the plaintiff; but, in such case, it must be proved, that the defendant knew he used to bite sheep; and evidence of two instances is sufficient, or perhaps a single one. *Dier*, 236.

And if, the owner having knowledge of his dog biting sheep, the dog injures animals of another kind, as by biting a horse, this too is actionable; for, the former mischief was sufficient notice to the owner. 1 *Raym.* 110: *Ca. K. B.* 335.

It having been once made known to the owner that his dog bit a man, he appears to be answerable for a subsequent mischief, though the man, afterwards bitten, had given some accidental occasion for it. Of animals naturally savage, lions, bears, tigers, &c. the very nature implies notice; these, therefore, the owner keeps at his peril. 2 *Espin. Rep.* 482: *Str.* 1264: 1 *L. Raym.* 608: 2 *L. Raym.* 1583: *Scheiffer*, 148.

But the owner is not answerable for the first mischief done by a dog, a bull, or other tame animal. *Bull. N. P.* 77. Yet, if he should carry his dog into a field, where he himself is a trespasser, and the dog should kill sheep, this, though the first offence, might be stated and proved as an aggravation of the trespass. See *Bull. N. P.* 77.

DOOR. — See *Arrest*.

DOWER. — See *Husband and Wife*.

Dower of things divisible must be set out by metes and bounds. 2 *Bl. Com.* 131 and 136: but, if it be indivisible, the wife must be endowed specially, as of the third toll-dish of a mill, &c. *Idem*.

Wives are entitled to dower out of *estates tail*. *Id.* 136.

A wife cannot be endowed of the trust-estates of her husband. 3 *P. Wms*, 229: but the husband may be tenant by the curtesy of such an estate. *Idem*.

Nor shall a wife be entitled to dower of an equity of redemption, where the estate was mortgaged in fee by the husband, previous to the marriage. 1 *Bro.* 326.

Where a devise is expressed to be given in lieu of dower, or when that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. *Co. Lit.* 36. *b. Harg. ed.*

If a woman, who is under age at the time of marriage, agrees to a jointure and settlement, in bar of her dower and her distributive share of her husband's personal property, in case he dies intestate, she cannot afterwards wave it, but is as much bound as if she were of age at the time of her marriage. 4 *Bro. P. C.* 570.

The widow is entitled to remain in the husband's capital mansion-house forty days after his death, during which time her dower shall be assigned. The particular lands to be held in dower must be assigned by the heir of the husband, or his guardian. If in this time it be neglected, or it be unfairly assigned, she has her remedy at law, and the sheriff is appointed to assign it. See 2 *Bl. Com.* 135.

If a dowager aliens the land assigned her for dower, she forfeits it. *Idem*, 137.

DRAFTS

DRAFTS ON BANKERS.— See *Bills of Exchange*.DURESS or *Constraint*.

Whatever is done by a man to save either life or limb is looked upon as done by the highest necessity and compulsion; therefore, if a man, through fear of death or mayhem,* is prevailed upon to execute a deed, or do any other legal act, these, though accompanied with all other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of non-compliance. 2 *Inst.* 483; and the same is also a sufficient excuse for the commission of many misdemeanors. The constraint a man is under in those circumstances is called, in law, duress; of which there are two sorts; — *duress of imprisonment*, where a man actually loses his liberty; and *duress per minas*, (by threats,) where the hardship is only threatened and impending. *Co. Lit.* 253: 2 *Roll. Abr.* 124.

But a fear of battery is no duress, nor is the fear of having one's house burned, or one's goods taken away and destroyed, because, in these cases, equivalent damages may be recovered. 2 *Inst.* 483.

And the threatening of me to kill, beat, wound, or imprison, my father, mother, child, brother, sister, or friend, will not make a contract void. 15 H. VI. 17: 11 Ed. IV. 13: 8 H. VI. 8: 18 H. VI. 21: 7 Ed. IV. 21: 20 *Aff. Pl.* 14.

DUTY.

Any thing that is known to be due by law, and thereby recoverable, is a duty before it is recovered; because the party interested hath power to recover it. 1 *Lill.* 495.

* *Mayhem*. A wound or bodily hurt, by which a man loseth the use of any member proper for his defence in fight.

DWELLING-

DWELLING-HOUSE. — See *Arrest*.

A man may assemble people together lawfully, (at least if they do not exceed eleven,) without any danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 1 *Hal. P. C.* 547.

EARNEST. — See *Contract* and *Deposit*.

EJECTMENT.

A landlord must not receive rent after he has brought an ejectment; if he does, it will be a waiver of the notice (to quit), and he will be nonsuited. 2 *Burr.* 668.

A tender of rent, before an ejectment is delivered, shall stay proceedings under the statute. 2 *Bl. Rep.* 746.

A mortgagee need not give notice to tenant to quit, before he brings ejectment, if he means only to get into the receipt of the rents and profits, though the mortgage be made subsequent to the lease; but, in such case, he shall not turn the tenant out of possession by the execution. *Bull. N. P.* 96. But, *N.* he should give notice to the tenant that he does not mean to do so.

ENCROACHMENTS.

Where a tenant makes encroachments on the waste, by enclosing it, and possesses it so long as to acquire a possessory right to it, such inclosure does not belong to the landlord. 1 *Espin. Rep.* 460; but see *Idem*, p. 461.

ENTRY. — See *Exchange*.

ESTATES.

Land not being subject to such fluctuations as the public funds, it is generally understood, that when the public funds will produce £5 per cent. then £4½ per cent. is reasonable interest

interest for money laid out in LAND ; and so, proportionably, when the funds give a higher or lower interest.

The value of estates depends, 1. on their situation ; 2. their quality ; 3. their tenure ; 4. the price of the funds, and the value of money ; 5. the plenty or scarcity of provisions in the country where situated ; and, 6. if houses, the state of their repairs.

Estates of land in fee-simple, generally speaking, bring from twenty to thirty years purchase, and houses from ten to twenty. On this head, however, it is difficult to lay down any certain rules, as the annual value, when compared with the actual rent, and state of repairs, must be the principal guides.

The value of leasehold estates, when there is a beneficial interest, may be ascertained in the same way as an annuity determinable at the expiration of a certain time. See ANNUITY.

Estates are *vested* or *contingent*. Those *vested* are vested either in *possession* or in *interest*. Those vested in interest are reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests, as are *not* referred to, or made to depend upon a period or event that is *uncertain*. Those *contingent* are contingent remainders and such executory devises, future uses, conditional limitations, and other future interests, *as are* referred to, or made to depend upon an event that is *uncertain*.

An estate is VESTED when there is an immediate fixed right of *present* or *future enjoyment*.

An estate is VESTED in *possession*, when there exists a right of *present enjoyment*.

An estate is VESTED in *interest*, when there is a present fixed right of *future enjoyment*.

An estate is CONTINGENT, when a right of enjoyment is to accrue, on an event which is *dubious* and *uncertain*.

A *vested* remainder is called a remainder *executed*.

ESTOVERS.

ESTOVERS.

To every tenant for life or years, the law, as incident to his estate, giveth him, without any expresse stipulation to that effect, three kinds of estovers: that is, 1. *House-bote*, which is two-fold, *estoverium ædificandi et ardendi*, that is, for repairing buildings, and for burning. 2. *Plough-bote*, that is, *estoverium arandi*, for mending carts, harrows, ploughs, and other implements of husbandry. And, 3. *Hay-bote*, that is, *estoverium claudendi*, for repairing and mending gates, stiles, hedges, stack-bars, &c. But these estovers must be reasonable. *Bract.* l. 4. 222, 231 : *Fleta.* l. 4. c. 19, 25, &c. : *Co.* 4. l. 86, 87.

These estovers the lessee may take without assignment of the lessor, unless he be restrained by special covenant. *Co. Litt.* 41. b.

ESTRAYS.— See *Finding*.

EVASION.

Evasion is a subtle endeavouring to set aside truth, or to escape the punishment of the law, which will not be endured. If a person says to another, that he will not strike him, but will give him a pot of beer to strike first, and accordingly he strikes, the returning of it is punishable; and, if the person first striking be killed, it is murder; for, no man shall *evade* the justice of the law, by such a pretence to cover his malice. 1 *H. P. C.* 81.

EVES-DROPPERS.

Persons that listen under walls and windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet, or are indictable at the sessions, and punishable by fine and finding sureties for good behaviour. *Kitch. of Courts*, 20: 4 *Black. Com.* 169.

EVIDENCE.

EVIDENCE.

Information concerning the nature of evidence, in certain particulars relating to trade, may be very useful.

The first thing to be observed on this head, and which deserves particular notice, is, that neither the party himself, or his wife, can be witness, to prove the sale or delivery of goods, or any other circumstance in which he is interested, (except in the case of a robbery between man and man, for which see *Hue and Cry*,) but his son or daughter may.

So also books of account, or shop-books, are not of themselves to be given in evidence for the owner; but a servant, who made the entry, may have recourse to them, to refresh his memory; and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence; for, as tradesmen are often under a necessity of giving credit, without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can be produced. 1 *Bl. Com.* 368.

Entries in the books of merchants, bankers, &c. can only be proved by the clerk who made them, even though that clerk be abroad. 1 *Esplin. Rep.* 1.

An entry made by a servant, specifying the terms of an agreement, is not evidence after his death, by proving his hand-writing. 2 *Esplin. Rep.* 616.

A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he can only swear to it, because it appears in a book or paper, the original book or paper must be produced. 3 *T. Rep.* 749.

An acknowledgement of having bought goods, borrowed money, or having otherwise contracted a debt, is good evidence of the existence of the debt, but great care should be taken, how this sort of evidence is relied on; for, if it
should

should come out, that, though the defendant confessed his dealings with the party, yet at the same time declared that he had paid him, the plaintiff will be nonsuited. And it may be observed, as a general rule on this kind of evidence, that whenever proof is given of an acknowledgement or confession, it must not be disjointed, or taken by parcels, but must be taken altogether.

Confessions, made during a treaty of compromise of a suit, are not admissible evidence; but an admission of a hand-writing is. 1 *Espin. Rep.* 143. *Vide sub.*

An admission of a demand, or confession made by a party when he is arrested, and ignorant whether by law he is bound to the payment of the demand or not, is not admissible evidence to charge him. 1 *Espin. Rep.* 155.

Where all matters in difference between parties have been referred to arbitration, but without any arbitration-bonds executed, the sum awarded is good evidence on the common count, as an account stated. 1 *Espin. Rep.* 94.

Evidence of the acknowledgement of the debt by an obligor does not supersede the necessity of producing the subscribing witness, in an action on a bond. *Doug.* 205, 216.

A deed must be proved by the subscribing witness; a party himself cannot acknowledge it in court. 1 *Espin. Rep.* 89.

Every instrument, to the signing of which there is a witness, should be proved by that witness, if living, or by proving the hand-writing of the witness, if he is domiciled in a foreign country, or in case he cannot be found, so that there may be a presumption of his death. 7 *T. Rep.* 266.

Where a deed has been executed under a power of attorney, the power itself should be produced in evidence. 1 *Espin. Rep.* 90.

An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the hand-writing of the witness, and of the contracting party, but not of the latter alone. 7 *T. Rep.* 265.

Whenever,

Whenever, in the course of a cause, terms of compromise are proposed between the parties, it does not seem to be the present practice to admit evidence of *concessions* made by either of the parties, with a view to a compromise; but evidence may be given of *facts* admitted in the course of such negotiations. 2 *Espin. Rep.* 475. "Certainly," said my Lord KENYON, on another occasion, "any admission or confession, made by the party, respecting the subject-matter of the action, obtained while a treaty was depending, under faith of it, and into which the party might have been led, by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice; but the fact of a handwriting being a person's or not stands on a different foundation; it is matter no way connected with the merits of the cause, and which is capable of being easily proved by other means." *Waldridge v. Kennison & al.* 1 *Espin. Rep.* 143.

These leading circumstances, concerning evidence, if duly attended to, may be eminently useful. To the merchant and trader it is recommended, whenever goods are delivered or sent out upon credit, that the porter or shopman employed in the delivery do either make an entry of it, in a book to be kept for that purpose, or that such entry be signed with the initials of such porter's or shopman's name.

EXCHANGE.

In exchanges of estates, there must be always equal quantities of estates, as a fee-simple for a fee-simple. Inequality of value is immaterial. *Co. Litt.* 51. Tenant in tail, after possibility of issue extinct, may exchange with tenant for life. 2 *Bl. Com.* 126.

On an exchange, or on partition, the parties have no freehold, either in deed or in law, before they enter. *Co. Litt.* 266, b.

EXCHEQUER.

EXCHEQUER-BILLS.

The sum of £2,750,000 is annually raised by Exchequer-bills on the credit of the land and malt tax, although it is well known that those taxes never yielded so much, the deficiency being always made good out of the next supplies.

They at present bear $3\frac{1}{2}d.$ a day per cent. interest, which is computed up to the day of sale.

These are generally for £100 each, and are drawn by authority of parliament. They are very current at market, and are more eligible than even *India Bonds*, as they have a parliamentary security, and are as readily turned into money.

They are paid at the Exchequer-Bill Office, in St. Margaret's Street, and the time of payment is notified by advertisement.

EXCISE. — See *Customs*.

The right of excise-officers, to break into houses in search of contraband goods, was agitated in the cause of *Boscock v. Saunders and others*, 13 G. III. when it was held by the court, that houses, that are entered as dealing in excisable commodities, are liable to be searched in the day-time, at the officer's discretion; but that no other houses are liable to be searched at all, (nor even those in the night-time,) without good cause of suspicion, proved upon oath to the commissioners or justices; but still, if the suspicion, though plausible, appears to be ill-founded, the officer who, by a false or mistaken suggestion, hath obtained the commissioner's license (improperly called a warrant) shall personally answer for the injury. 1 *Bl. Rep.* 912.

All actions against excise-officers must be brought within three months after the offence committed. *Stat.* 17 Geo. II.

A person who intends to become a dealer in foreign wine must take out his license, and enter his warehouse, before he lays in his stock; and a dealer in wine is not permitted to remove wine sold, which was laid in before he took out his license. 2 *T. Rep.* 381. Dealing means buying. *Ibid.*

A person who sells spirituous liquors by retail, without a license from two justices, is liable to the penalties of the statute, 5 G. III. c. 46, though he has a license from the commissioners of excise to retail spirituous liquors. 3 *T. Rep.* 560.

A permit for removing wine from one place to another, under the statute, 26 G. III. c. 59, dated nine o'clock in the morning of one day, and giving the party one hour for removing it out of the stock of A. and two days more for delivering it into the stock of B. expires at ten in the morning of the second day after it is granted. 5 *T. Rep.* 255.

EXECUTION. — See *Judgement.*

By *Stat.* 29 Car. II. sect. 16, no *fi. fa.* or other execution shall bind the property of goods, but from the time of the delivery of such writ to the sheriff. Formerly the sheriff might take goods in execution in the hands of a buyer, who had bought them after the teste of *fi. fa.* but before the sheriff had executed it: and this statute only secures the possession of innocent vendees under an execution; but, as to the rest of the world, the goods are bound, from the delivery of the writ, to the sheriff. 1 *T. Rep.* 729.

The rights of different plaintiffs having several executions are determined by a priority of delivery to the sheriff, without any regard to any priority of seizure by his bailiffs, who are his servants. 1 *T. Rep.* 729.

The sheriff may impanel a jury to try the right to goods seized under a *fi. fa.* which will justify him. 4 *T. Rep.* 648: 6 *T. Rep.* 88.

The *Stat. 8 Anne, c. 14, sect. 1*, only extends to the immediate, not to the ground, landlord. *Scheiffer, 54.*

The sheriff, by an *elegit*, has no power to deliver lands to a creditor, who must bring an ejectment to obtain possession, and, when he has possession, he cannot sell them, but only receive half the rents. *Scheiffer, 55.*

Fi. fa. sued out 26th of August, delivered to the sheriff 27th; act of bankruptcy 5th September, levy made 19th October. In this case, the property of the goods remained in the bankrupt, after the delivery of the execution to the sheriff; and, as the act of bankruptcy was committed before the execution began to be executed, (till which time the property was not altered,) it would seem that the assignees were entitled. *MS.*

A judgement, signed in any part of the term, or the subsequent vacation, relates back to the first day of term, notwithstanding the death of the defendant before judgement be actually signed; and an execution against the defendant's goods may be taken out on it, tested the first day of the term. *7 T. Rep. 20.*

Sheriffs poundage, either on body or goods, is 12 *d.* for every 20*s.* to £100, and 6 *d.* for every 20*s.* above. On *hab. fac. possess.* 12 *d.* for every 20*s.* yearly rent, to £100, and 6 *d.* above.

The sheriff is not entitled to poundage till the goods are sold, nor if the judgement is irregular. *Lofft, 253, 333.*

EXECUTORS.— See *Priority and Trustees.*

Where an action is commenced against an executor for a debt due from the testator, and the executor has not assets, *i. e.* property sufficient of the testator to pay the demand, he should plead *plene administravit*; that is, that he has, in a lawful way, disposed of all the testator's effects; for, if judgement be suffered to go by default, the executor will be personally liable. *Imp. K. B. 270.*

An

An executor may sell goods or release debts without his companion, and it will be good against him ; and, generally speaking, any one executor may do as much as all together ; but it is not so with administrators, because they have but one joint authority, created by the law : 1 *Atk.* 460 : nor with trustees. 1 *Harr. Chan. Int.* 25.

All debts must be paid before legacies ; and debts in the following order ; 1. debts to the king ; 2. debts on judgement (but not unless docketed ; see 1 *Espin. Rep.* 314), statutes, &c. ; 3. debts on mortgages, bonds, and other specialities ; 4. rents, servants' wages, notes, bills of exchange, book-debts, and all others, denominated simple-contract debts. But it is said, that arrears of rent, incurred in the lifetime of the testator, shall be paid before bond-debts, though reserved on a parole lease. 1 *Vern.* 490.

Debts first prosecuted against an executor shall be first paid, though but in equal degree ; but an executor, by confessing a judgement, may give a preference.

Where a testator is much indebted, and his affairs complicated and incumbered, so as not to allow the executor safely administering his estate, his safest way is, to file a bill in equity against the creditors, to the end they may, if they please, contest each others debts, and dispute who ought to be preferred. 2 *Vern.* 37.

Creditors made executors may prefer themselves to others of equal degree, *N. Abr.* 378 : but an executor *de son tort* (that is, *of his own wrong*) cannot, though he be a creditor in a superior degree. *East.* 30 G. III. *K. B. Curtis v. Vernon*, executor of Palmer.

Simple-contract debts, due from one citizen to another, in case of intestacy, shall be paid in equal degree with those due by speciality. *Cro. Eliz.* 315 : 4 *Co.* 82, b. : *Cro. Eliz.* 409.

There shall be no bill in equity, against an executor, to discover assets before a suit commenced at law ; for, perhaps,

if he were sued at law, he would confess and pay the debt. *Hard. 115.*

But, for a legacy, the suit must be in equity; unless there be proved an express admission of assets, and an express promise to pay. 5 *T. Rep.* 690.

The executor of A.'s executor is the executor of A.; but the executor of A.'s administrator is not; nor is the administrator of A.'s executor. 2 *Black. Com.* 507.

A testator left his father and nephew (who owed him £500 each) his executors, and named no residuary legatee. *Lord Chancellor.* — "It is a settled point in this court, that the appointment of a debtor-executor is no more than parting with the action. This is a trust for the next of kin." *Carey v. Gooding, Trin. 30 Geo. III.*

An executor may confess judgement on one obligation, and plead that judgement to an action brought on another obligation; and, if there be two obligations, and an action on each, he, that obtains judgement first, must be first satisfied; and though, where there are several obligations of the same kind, the executor may discharge which of them he thinks fit, yet he cannot if a suit be commenced. 2 *Fonblan. Eq.* 411. See PRIORITY.

In actions by executors, all must join, though some do not take upon them the executorship. Where, indeed, several are named executors, and one only proves the will, and acts, that one is liable to an action. 1 *Roll. Abr.* 924: *Jenk. Cent.* 106, 7.

If a person, appointed an executor, would completely exonerate himself, he must not only refuse, but actually renounce, the executorship.

Executors are not obliged to join in a sale. There is a difference between joint trustees and executors. Executors may act separately if they think fit; but, if a trust-estate is to be sold, the trustees must join in the conveyance and receipt. 1 *Harr. Chanc. Pract. Introd.* 25.

If

If executors carry on trade, they must do it as individuals; unless they carry it on under the direction of the Court of Chancery. 1 *T. Rep.* 295.

A promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum*.* 5 *T. Rep.* 6.

No funeral expenses are allowable against a creditor, except a coffin, ringing the bell, parson, clerk, and bearers fee; but not for pall or ornaments; the usual sum allowed is £5. 1 *Salk.* 296.

FACTOR. — See *Agent, Authority.*

There is a wide difference between a general and a particular agent. If a person be appointed an agent for a particular purpose, and under a limited and circumscribed power, he cannot bind the principal by any act in which he exceeds his authority; but, if a person be appointed a general agent, as in case of a factor for a person residing abroad, the principal is bound by his acts.

The law considers a factor as a servant *pro tempore*,† with regard to such of his acts as affect his employer's property. Therefore, where a merchant consigns goods to a factor in *London*, or elsewhere, the factor can have no property in such goods, neither will they be affected by his bankruptcy. 3 *P. Wms.* 186.

If a factor, or such like accountant, be robbed without his default or negligence, he shall be discharged thereof upon his account, unless there is a special agreement to the contrary. *Co. Litt.* 89.

If a man make another his factor to buy goods for him, the employer shall be charged by his contract, though the goods come not to his possession. *Noy's Max.* 17.

* *i. e.* Naked agreement, not a good consideration.

† For the time.

Every factor of common right is to sell for ready money; but, if he be a factor in a dealing or trade, where the usage is for factors to sell on credit, there, if he sells to a person of good credit at that time, and he afterwards becomes insolvent, the factor is discharged; otherwise it is, if he sell to a person notoriously discredited at the time of sale. 12 *Mod.* 514.

Where a factor on the sale of goods takes the risk of the purchaser's solvency upon himself, his principal may, though the goods were sold in the factor's name, maintain an action against the purchaser, if notice had been given of the property before payment made to the factor. For, the factor's sale creates a contract between the buyer and the owner of the goods; and, therefore, if the factor sells for payment at a future day, if the owner gives notice to the buyer to pay him and not the factor, the buyer is not justified in paying the factor. *Bull. N. P.* 130. And this doctrine was recognized in the case of *Escot v. Milward*, *Sitt. after M.* 24 Geo. III. 1 *Espin. Rep.* 108. And, therefore, the doctrine laid down in some books, that the owner cannot arrest money due on a sale of goods by a factor, in the hands of a buyer, seems not to be law.

Where a factor hath a bare authority to sell, he hath no power to give a day of payment; nay, though they were perishable goods; but he must receive the money immediately upon the sale. 2 *Mod.* 100.

Though a factor has power to sell, and thereby to bind his principal, yet he cannot bind nor affect the property of goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. 2 *Str.* 1178. And, if he pawn them, the principal may recover the value in an action of trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. 5 *T. Rep.* 604.

A factor, to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession. 1 *Burr.* 494. And this lien creates such an interest as will entitle him to recover on a general policy on goods. *Parke on Insur.* 11, 286. But, while goods remitted to a factor remain in specie, they are not subject to his bankruptcy. 2 *Black. Rep.* 1154: 3 *P. Wms.* 185.

If a factor sells goods consigned to him and becomes a bankrupt, the merchant must come in under the commission; but, if he had laid out the money in other goods for the merchant, the merchant should have them. *Bull. N. P.* 43. And so, if the factor receives notes instead of money, the merchant shall have the notes. 1 *Atk.* 234.

If a factor sell the goods of a person beyond sea, he may maintain an action in his own name for the price; for, the promise shall be presumed to be made to him. And so, if he buys goods, the seller may have an action against him; for, the credit shall be presumed to be given to him; and particularly because it is for the benefit of trade. *Tr.* 1 *Ann. MS.*: *Bull. N. P.* 130.

Where a factor sells goods as a principal, and the buyer has no notice that the seller is only a factor, he has a right to consider the factor as a principal, and may set off a debt owing to him by the factor to an action brought by the principal for the price of the goods. 2 *Espin. Rep.* 557.

Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold; and, if the factor becomes a bankrupt, they must be returned to the principal; subject to such a lien as the factor may have thereon. 2 *Black. Rep.* 1154.

A trader, after a secret act of bankruptcy, consigned his goods to a factor, who agreed to advance money thereon; and, accordingly, accepted and paid bills drawn on him by the trader. A commission afterwards issued against the trader on such prior act of bankruptcy; after
which

which the factor sold the goods and received the money. — Held, that he was answerable to the assignees for the value of the goods. 8 *T. Rep.* 199.

FAIRS. — See *Tolls, Markets.*

FALSE IMPRISONMENT. — See *Imprisonment.*

FEEES.

Neither a counsel or physician can maintain an action for fees. 1 *T. Rep.* 317.

FENCES,

If fences are in want of repair, whereby my cattle get into B.'s corn, who ought by prescription or otherwise to repair them, I may plead the want of a fence. And a man may justify entering to rechase cattle that escaped for want of fences. 2 *Roll.* 565. But he may not after notice permit his cattle to continue there. 2 *Lev.* 93.

Action on the case for not repairing fences, whereby another party receives damage, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession. 4 *T. Rep.* 318.

Three feet nine inches are allowed for hedge and ditch in old inclosures. In new inclosures, it is the practice to set out four feet for hedge and ditch.

FERRY.

An action will lie for disturbing another in his right to an exclusive ferry; but not if the alleged disturbance arise from the conveyance of persons to a place either below or above the established ferry, to which the ferryman is not compellable to find boats. 1 *T. Rep.* 666.

FIGHTING.

FIGHTING. — See *Boxing-Matches; Evasion.*

FINDING. — See *Stolen Goods, Notes, and Markets.*

A person finding any thing has a special property therein, but he is answerable to the person in whom the general property is. He has a right against every person but the loser. *Str.* 505.

The finder is not answerable for a mere nonfeasance or neglect; yet, if he makes gain of the thing he finds, or if he rides a horse, or abuses or spoils the thing he finds, he shall be answerable. 1 *Roll.* 5: 1 *Leon.* 224.

In the case of estrays seized by a lord of a manor, the owner may claim his property within a year and a day, paying the charges of finding, keeping, and proclaiming them. If not claimed within the time allowed by law, they become the property of the lord. But, if any other person finds and takes care of another's property, not being entitled to it as an estray, the owner may recover it or its value, without being obliged to pay the expenses of keeping. 2 *Black. Rep.* 1117. And estrays must not be used except in case of necessity, and for the benefit of the owner, as to milk milch-cows, &c. 1 *T. Rep.* 12.

If bank-bills, tickets, &c. stolen or lost, are paid to or delivered to another without consideration, an action lies against any one in whose hands they are found. 1 *Morg.* 305. And the law seems to be the same, though a consideration was given, if the party had previous notice of their being lost or stolen. *Id.* 106.

If a bill, payable to A. or bearer, be found by B. who, for a valuable consideration, gives it to C. an action of trover lies against B. to recover the value of the note. *Ibid.* But not against C. 1 *L. Raym.* 738.

But the property of goods found or stolen may be changed by sale, for a valuable consideration and without notice,

notice, in a market overt; and the person purchasing obtains a title to them against the original owner. *Ibid.*

FIRE. — See *Leases*.

Where houses under lease are burnt down, and there is an exception of damages by fire, the landlord is not obliged to rebuild, although he may have insured. The premises being insured by the landlord is nothing to the tenant; and, if there be an express covenant to pay the rent, the landlord, in the rigour of the law, may oblige the tenant to pay the rent during the remainder of the term, although he has nothing to occupy. *Dier*, 33, a.: 2 *L. Raym.* 1477: 2 *Str.* 763: 1 *T. Rep.* 310, 710.

And, on a general covenant to repair, without an exception of fire, the tenant is compellable to rebuild in case of accidental fire. 6 *T. Rep.* 650.

In order to avoid these evils, an exception of damages by fire should be made in the reservation of rent, and the landlord should enter into a covenant to rebuild.

If a man buys a house, and, before the time arrives when by the articles he is to pay for it, it is burnt down by casualty, it is said he shall not be bound in equity to pay the money. 2 *Wils. Rep.* 220.

FIRE, *Insurance against*.

An insurance against fire is a contract by which the insurer undertakes, in consideration of the premium, to indemnify the assured against all losses which he may sustain in his house or goods, by means of fire, within the time limited in the policy.

The terms upon which the insurance-offices grant insurances are contained in their *proposals*, which every one who insures is considered as submitting to and bound by.

Of

Of these, the *London-Assurance Company* insert a clause, that they will not hold themselves liable for any damage by fire occasioned by any invasion, foreign enemy, or any *military or usurped* power whatever. Under which, it has been held, that the insurers were not exempted from, but liable to make good, a loss by fire occasioned by a mob, which arose under pretext of the high price of provisions, and burned down the plaintiff's malting-house. 2 *Wils.* 363.

The *Sun-Fire Office* adds *civil commotion*; and it was held, that, under these words, the company was exempt from losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute made in favour of Roman Catholics. *Langdale v. Mason: Parke, v. 23.*

The *Phoenix Fire-Office* has a clause, that the insured, to entitle him to recover, shall produce a certificate of the minister and churchwardens as to his character, and their belief of the loss sustained, &c. Which clause has been held to be in law a *condition precedent*; and that the insurers are not liable, unless the terms are strictly complied with. *Lockyer and Bream v. Worsley*, and *Worsley against Wood and others, assignees of Lockyer and Bream, K. B.* 36 Geo. III.

When a loss happens, the insured is bound by the proposals of most of the societies, and ought in all cases to give immediate notice of the loss, and as particular an account of the value, &c. as the nature of the case will admit of, &c.

These policies are not in their nature assignable, nor can the interest in them be transferred without the express consent of the office, contrary to what has been determined in the case of *marine insurances*. 1 *T. Rep.* 26: 3 *Bro. Parl. Cas.* 497.

It is however provided, that, when any person dies, the interest shall remain to the heir, executor, or administrator, respectively,

respectively, to whom the property belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their names. *Parke*, 449.

It is necessary that the party insured should have an interest in the thing insured at the time of offering the policy, and at the time the fire happens; and, therefore, after the lease of the house is expired, if the insured assigns the policy, that does not oblige the insurers to make good the loss to the assignee. 3 *Bro. Parl. Cas.* 497: 2 *Atk.* 554.

The premium upon common insurances is 2*s.* per cent. for any sum not exceeding £1000; and 2*s.* 6*d.* from £1000 upwards; and the duty to government, under the *Stat.* 22 *Geo.* III. c. 48, is 1*s.* 6*d.* per cent.

The same principles as to *fraud* and the *return of premium* apply to these insurances as to all others.

FISH. — See *Piscary*.

An action does not lie for fishing in a river where the tide ebbs and flows; for, the property of the soil of all such rivers is in the king; and all persons have *prima facie* a right to fish therein. 1 *Mod.* 105.

The owner of a several fishery may lawfully distrain nets found in his water, as nets doing damage; but, if he cuts them, an action of trespass lies. *Cro. Car.* 228, 165.

FIXTURES. — See *Distrain*.

The general rule is, that whatever is fixed to a house is a part of it, and cannot be removed.

But the old rules on this subject are greatly relaxed; and now, where a person, who hath a particular interest in a house, annexes any thing to it for the benefit of his own trade, as vats, coppers, &c. he may disunite it during the continuance of that interest, if it may be done without injury to the freehold. *N. Abr.* 420.

And,

And, during the term, the *tenant* may take away chimney-pieces, or wainscot, which he has put up, but not afterwards, for then he would be a trespasser. 1 *Atk.* 477 : *Bull. N. P.* 34.

And a tenant may in like manner remove a building, which he has erected on blocks and timbers lying on the ground, but not fixed in it. *Bull. N. P.* 34.

The old rules of law have been relaxed chiefly between landlords and tenants, and tenant for life, and remainderman, and not so frequently between an executor and heir. 3 *Atk.* 13 : 1 *Str.* 1142.

FORCE. — See *Durefs.*

FOREIGN ATTACHMENT.

By this customary proceeding of the city of London, a creditor may attach, in the hands of a third person in that city, (in such proceedings called the *garnishee*,) the money or goods of his debtor, in order to compel him (the debtor) to appear, and answer his (the creditor's) demand ; and, in default of his appearance, the property attached is, by the judgement of the court, condemned and ordered to be paid or delivered over to the creditor. *Emerson*, 58.

In order to ascertain whether the property can by the custom be attached, this general rule is to be observed, that, if the property, intended to be attached, is so circumstanced that the owner himself could maintain an action of *debt* or *detinue* for the same, and, if withheld, could not legally enforce the payment or delivery by his own act, or by a summary or any other mode of proceeding short of an action at law, such money or goods are in general attachable. *Id.* 59.

FORESTALLING.

The statutes against forestalling, &c. have been all repealed ; but the old common-law remedy against such offenders,

fenders, (forestallers, regraters, and ingrossers,) still remains in its full force. *Per Lord KENYON, Hil. 40 G. III.* This was stated by my Lord Kenyon to be the law, on a motion for a rule to shew cause why a criminal information should not be granted against Mr. *Waddington*, for buying up hops, and forestalling the market.

FORFEITURE. — See *Penalty*.

It is a standing rule in equity, that a forfeiture does not bind, where the thing may be done afterwards, or any compensation may be made for it. *2 Vent. 252.*

FRAUDS AND PERJURIES. — See *Contracts*.

FREIGHT. — See *Charter-Party* and *Seamen's Wages*.

The consignee of goods is *prima facie* liable for the freight. *1 Espin. Rep. 33.*

Where the freight is by the month, the computation shall be by the calendar, not lunar, month. *Id. 186, 247.*

If a ship be disabled or captured, when part of the voyage is performed, without fault of the master, he shall be paid a rateable proportion of the freight. *2 Burr. 882.*

If a freighted ship becomes disabled without the master's fault, he has his option to refit, (if possible in convenient time,) or to hire another ship to carry the goods. If the merchant will not agree to this, the master is entitled to the full freight for the whole voyage. *2 Burr. 882: 1 Black. Rep. 190.*

A ship is freighted so much *out* and so much *in*: there shall be no freight due till the voyage is performed: so that, if the ship be cast away coming home, the freight is wholly gone. *1 Brownl. 21: Mal. 98: and see 2 Ch. Ca. 75: 2 Vern. 212: and also Doug. 541, 2,* that, where a ship perishes, the whole freight, from the last place or time of payment, is lost.

On

"On a covenant to pay freight for "goods delivered at "A." freight cannot be recovered *pro rata*, if the ship be wrecked at B. before her arrival at A. though the defendant accepted his goods at B. 7 *T. Rep.* 381.

GAME.

I. *Of Gamekeepers.*—All lords of manors, or other royalties, not under the degree of an esquire, may, by writing under their hands and seals, authorize one or more game-keeper or game-keepers, within their respective manors or royalties. 22 and 23 Car. II. c. 25, sect. 2.

But he shall not make above one person to be game-keeper within one manor, with power *to kill game*, whose name shall be entered with the clerk of the peace. 9 Anne, c. 25, sect. 1.

But, if the game-keeper shall, under colour thereof, sell and dispose of game, without the lord's consent, he shall be committed for three months to hard labour. 5 Anne, c. 14, sect. 4.

And if any other game-keeper, not so entered, or otherwise qualified, shall *kill, sell, or expose game to sale*, he shall, for every offence, forfeit £5, half to the informer and half to the poor, by distress, or, for want thereof, be committed for three months for the first offence, and for every other offence, four months. 9 Anne, c. 25, sect. 1.

He must also cause his deputation to be registered with the clerk of the peace of the county; and take out an annual certificate, charged with a stamp-duty of 10s. 6d. and 10s. 6d. total £1. 1s.: and, neglecting or refusing to take out such certificate, within twenty days after deputation granted, he shall be subject to a penalty of £20; and every new deputation shall have a new certificate, &c.; but such deputation and certificate shall not authorize the destruction of game out of the manor. 25 G. III. c. 50: 31 G. III. c. 21.

And

And by *Stat. 3 G. I. c. 11*, a game-keeper, with power to kill game, not being *qualified*, or not being *truly* and properly a *servant* to the lord, or not *immediately employed* and appointed to take and kill game for the sole use of the lord, is in the same plight that other persons are.

And the game-keeper (properly authorized) may search for dogs and engines, and seize the same for the use of the lord, or destroy them. *22 and 23 Car. II. c. 25, sect. 2*. But it seems that, for this purpose, he should also be armed with a justice's warrant. *Comb. 183*.

And it seems that a game-keeper has a right to keep and have dogs, guns, and nets, any where, and that his gun cannot be seized in going to or returning from the manor, or in any other place. *2 Willf. 387*.

II. *Qualification to kill game*. — By the *Stat. 22 and 23 Car. II. c. 25*, every person, not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of £100 per annum, or for term of life, or having lease or leases of ninety-nine years, or for a longer term, of the clear yearly value of £150, (other than the son and heir-apparent of an esquire, or other person of higher degree, and the owners and keepers of forests, parks, chases, or warrens, being stocked with deer or coney for their necessary use, in respect of the said forests, parks, chases, or warrens,) is declared to be a person not allowed to have or keep for himself, or any other person, any guns, bows, greyhounds, setting-dogs, ferrets, coney-dogs, lurchers, hays, nets, low-bels, hare-pipes, gins, snares, or other engines, for taking and killing of game.

On this statute, it has been determined,

1. That a person, whose estate is mortgaged so as to reduce it to less than £100 per annum, is notwithstanding qualified. *Cald. Cas. 230*.

2. That

2. That a life-estate of less than £150 per annum is not a qualification. *Id.* 188.

3. That a doctor of physic, under a Scotch diploma, is not qualified: the qualification derived from a *doctor* must be from Oxford or Cambridge. 1 *T. Rep.* 44. But a doctor of physic of the *English* universities is not qualified as such. *Id.* 53.

4. That this statute repeals the personal qualification of the statute of *James*, and leaves no other qualification but that of land,* with the exception in favour of the heir-apparent, on account of his right of succession. *Ibid.*

III. *Search.* — By the same *Stat.* 22 and 23 Car. II. c. 25, sect. 2, it is declared, that the game-keeper, or any other person, (authorized by warrant of a justice of the peace,) may, in the day-time, search the houses, out-houses, or other places of unqualified persons, upon good grounds suspected to have or keep any *guns*, &c. [as before,] and the same to seize and keep for the use of the lord, or otherwise to cut in pieces or destroy.

And by *Stat.* 4 and 5 W. III. c. 23, constables, authorized by a justice's warrant, may search for *hares*, *partridges*, *pheasants*, *pigeons*, *fish*, *fowl*, or *other game*; and, if any found, the offender, if he do not satisfy the justice how he came by the same, or of whom he bought them, he shall forfeit for *each* not under 5*s.* nor more than 20*s.* and, for want of distress, shall be committed not more than one month, nor less than ten days. — *Note*, Rabbits killed in a private warren are not game within this act. 1 *L. Raym.* 151.

IV. *Penalty on keeping or using dogs or engines.* — By the *Stat.* 5 Anne, c. 14, if any unqualified person shall *keep* or *use* any *greyhound*, *setting-dogs*, *hays*, *lurchers*, *tunnels*, or

* In order to this construction, the courts supply the particle "of" between *or* and *other*, making it, "or of any other person of higher degree;" by which the father is excluded, although the son and heir-apparent is qualified.

any other engine, to kill and destroy the game, he shall forfeit £5, half to the informer and half to the poor, to be levied by distress; and, in default of distress, be imprisoned for three months for the first offence, and, for every other offence, four months; and any justice or lord, within his manor, may take away such *dogs, nets, or other engines*, in the power or custody of unqualified persons.

On this statute, which is that on which most modern convictions are made, (there being other former statutes with inferior penalties,) it has been determined,

1. That an unqualified person may attend a qualified person to beat the bushes, &c. if the dogs be not his. *Lofft. 178.*

2. If two use a greyhound to destroy game, it is but one penalty, and not two of £5 each. *4 T. Rep. 809.*

3. That *keeping* is as much prohibited as *using*: *Str. 496.* In this case it was doubted, whether a *gun* is such an engine as is within the statute: and a difference was taken as to the keeping a *dog*, which could only be to destroy the game (*a lurcher*), and keeping a *gun*, which a man might do for the defence of his house.

4. And it was afterwards positively determined, that a man was not liable, under this statute, for *keeping* a gun. *Andr. 255: 2 Sess. Cas. 204: Str. 1098.*

5. In the case of *K. and King*, Chief-Justice *Parker* said, that walking about with intent to kill game is evidence of *using* the instrument for that purpose. *1 Sess. Cas. 88.*

6. That a *hound* is not within this statute, although it is within the statute, 22 and 23 Car. II. c. 25: *Str. 1126: Co-myns, 576.*

7. That although the statute mentions, as a ground of conviction, the *oath of one witness*, yet that a *confession* of the party was sufficient. *Str. 546.*

8. That the *informer* cannot be a *legal witness*. *L. Raym. 1545: Andr. 240.*

9. That

9. That an indictment will not lie. *Str.* 679.

10. That if a man, not qualified, goes a hunting, and kills never so many hares on the same day, though in several different places, he shall forfeit but one £5; for, under this statute, it is but one offence. 10 *Mod.* 26: 26 *Comyns*, 274.

11. And on an information, charging the defendant with keeping and using a *dog*, and also a *gun*, on the same day, he can only be convicted in one penalty. 7 *T. Rep.* 152.

V. *Carriers, inn-keepers, &c.* — By the above *Stat.* 5 Anne, c. 14, if any higler, chapman, carrier, inn-keeper, victualler, or alehouse-keeper, shall have in his *custody* or *possession*, or shall *buy, sell, or offer to sale*, any hare, pheasant, partridge, moor or heath game, or grouse, unless such game, in the hands of such *carrier*, be sent up by some person qualified, (or, by 28 G. II. c. 12, if *any person whatsoever*, whether qualified or not, shall *sell,* expose or offer to sale*, any such,) he shall, on conviction within three months after the offence, on view or oath of one witness, forfeit, for *every* such hare, &c. £5, half to the informer and half to the poor, and, for want of distress, be committed, for the first offence, three months, and for every other offence four months.

And by the said statutes of 8 G. I. and 9 Anne, c. 25, if any *hare*, &c. [as before,] shall be found in the shop, house, or possession, of any *poulterer, salesman, fishmonger, cook, or pastry-cook*, or of *any person not qualified*, in his own right, to kill game, or entitled thereto under some person so qualified, it shall be deemed an exposing thereof to sale.

And the *Stat.* 1 Jac. c. 27, sect. 4, imposes 10s. penalty on any person who shall sell, or buy to sell again, any hare.

* It seems, by the distinction observed in these two statutes, that qualified persons may *buy* game, without being subjected to any penalty, unless they buy to sell again. See *Stat.* 1 Jac. c. 27, sect. 4.

And by said 5 Anne, any justice, and lord within his manor, may take away such hare, &c.

By sect. 3, persons who shall destroy, sell, or buy, any hare, &c. [as before,] and shall in three months discover to conviction any higher, chapman, carrier, inn-keeper, alehouse-keeper, or victualler, that hath bought or sold, or offered to buy or sell, or had in his possession, any such game, he shall be discharged of pains and penalties, and have the same benefit as any other informer.

VI. *Inferior tradesmen sporting, and as to officers, &c.*—

By the Stat. 4 and 5 W. III. c. 23, sect. 10, it is recited, that whereas great mischiefs do ensue, by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours; therefore, if any such person shall presume to hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice, duly qualified,) he shall not only be subject to the other penalties, but, if he be prosecuted for trespass, in coming on any person's land, and be found guilty, the plaintiff shall not only recover damages against him, but full costs.

1. It does not appear to have been decided, what an *inferior tradesman*, within the meaning of the statute, is: an attempt was once made to determine it, in the case of *Buxton v. Mingay*, Trin. 30 G. II.; but the court was equally divided. 2 *Wils.* 70.

2. A huntsman going out, and hunting without his master, is not a *dissolute person* within this statute. *Black. Rep.* 900.

Officers or soldiers, without leave of the lord of the manor, under his hand and seal, destroying game, pigeon, or other fowl or fish, such officer shall forfeit £5, and the commanding officer 20s. for each soldier. *Mutiny-Acts.*

VII. *Taking in the night, or on a Sunday or Christmas-day.* — By the 33 Eliz. c. 10, if any person, of what *estate, degree, or condition*, soever; shall take, kill, or destroy, any *partridges or pheasants* in the night-time, he shall forfeit, for every pheasant, 20s. and for every partridge 10s.; half to him that shall sue, and half to the lord, and give security not to offend again for two years. If the penalty is not paid in ten days, he shall be imprisoned for one month.

By the 9th Anne, c. 25, in both cases the penalty is increased to £5, or, for want of distress, three months imprisonment for the first offence, and four for subsequent ones.

And by the Stat. 13 G. III. c. 80, to kill, take, or destroy, or to use any gun, dog, snare, net, or other engine, with intent to kill, &c. any hare, pheasant, or partridge, in the night, *i. e.* between seven at night and six in the morning, from the 12th of October to the 12th of February, and between nine at night and four in the morning, from the 12th of February to the 12th of October, or in the day-time on a Sunday or Christmas-day; incurs a forfeiture, for the first offence, not exceeding £20 nor less than £10, for the second £30 nor less than £20, and for the third, and every other subsequent, £50. The Stat. 9 Anne, c. 25, imposes a penalty of £5 for taking or killing a hare in the night.

VIII. *Tracing hares in the snow, &c.* — By Stat. 1 Jac. c. 27, persons tracing hares in the snow shall, on conviction, forfeit, for the use of the poor, 20s. for every hare, or be committed for three months. He may, after one month's imprisonment, become bound, with sureties, not to offend again.

Engines for hares. The same statute imposes a like penalty on every person taking or destroying hares with hare-pipes, cords, or any such instruments, or other engines. And by the Stat. 22 and 23 Car. I. c. 25, persons found or apprehended setting or using any snares, hare-pipes, or other

like engines, shall give to the party injured damages in the magistrate's discretion, and shall pay down a sum, not exceeding 10s. or be committed for one month.

By the *Black Act*, (9 G. I. c. 22,) if any person, armed and disguised, shall appear in any warren or place where hares are usually kept, or unlawfully rob any such warren, or (whether armed and disguised or not) shall rescue any person in custody for either of these offences, or procure any to join with him in any such unlawful act, he shall be guilty of felony without benefit of clergy.

IX. *Times for sporting, &c.*—By *Stat.* 13 G. III. c. 80, no person shall take, kill, carry, sell, buy, or have in his possession, or use, any *partridge* between February 12 and September 14, or any *pheasant* between February 1 and October 1, on pain of forfeiting, for every fowl, £5; nor any *black game* between December 10 and August 20; nor any *grouse*, commonly called *red game*, between December 10 and August 11; nor any *bustard* between March 1 and September 1; under forfeiture, for the first offence, of a sum not exceeding £20 nor less than £10, and for the second and every subsequent offence not exceeding £30 nor less than £20.

Certificate. By *Stat.* 25 G. III. c. 50, and 31 G. III. c. 21, every person using any dog, gun, or engine, for taking game, shall deliver his name and place of abode to the clerk of the peace, and take out an annual *certificate* or *license*, on a stamp of £2:2s. and £1:1s.; total, three guineas.

GAMING.

By 16 Car. II. c. 7, if any person shall play at cards, &c. other than for ready money, or bet, and shall lose above £100 at any one time or meeting, upon tick, he shall not be bound to make it good; but the contract or tick and security shall be void, and the winner shall forfeit treble value.

And,

And, by 9 Anne, c. 14; all notes, bills, bonds, judgments, mortgages, or other securities, given for money won at cards, dice, tables, tennis, bowls, or other games; or by betting on the sides of such as play, or for re-payment of any money knowingly lent for such gaming or betting; shall be void. And, by the same statute, if any person playing at cards, &c. or betting, shall lose the value of £10, at one time, to one or more persons, and shall pay the money, he may recover the money lost, by action of debt, within three months.

Betting on horse-races, cricket, foot-races, is within the *Stat. 9 Anne. 2 Str. 1159: 2 Wils. 309: 1 Wils. part 1, p. 220: 2 Wils. 36.*

But, on a wager between two persons on the lives of their two fathers, the winner has been allowed to maintain an action. *Burr. 2802.*

Where two persons played at *all-fours* for two guineas a game, from *Monday* evening to *Tuesday* evening, without any interruption, except an hour or two at dinner, the plaintiff lost fourteen guineas, for which he brought his action on *Stat. 9 Anne*; and it was held to be *one sitting*. — *One time* in the act means one stake or bet, and is distinguished from *one sitting*, which means a course of play, where the company never parts, though the party may not be actually gaming the whole time. *2 Black. Rep. 1226.*

A bill of exchange for money won at play cannot be recovered upon, even by an indorsee, for a valuable consideration, and without notice, the original vice of the consideration affecting the security, even in the hands of an innocent and *bonâ-fide* holder. *2 Str. 1155: Doug. 636, 736.* And it seems that, if money be paid on such security, it may be recovered back. *Ambler, 269.*

An assumpsit will lie to recover money, even at play, if under £10, and the play has been fair. *1 Espin. Rep. 235.*

It is observable, that the *Stat.* 16 Car. II. declares, that the contract for money lost at play, and all *securities* given for it, shall be utterly void. But the *Stat.* 9 Anne confines itself to the *securities* for money *won* or *lost* at play. Upon which it has been determined that, though both the *security* and the *contract* are void as to money *won* at play, only the *security* is void as to money *lost* at play; and that the contract remains, and the lender may maintain his action for it. 2 *Burr.* 1077: 2 *Str.* 1249.

An action will lie to recover money knowingly lent to game with, where no *security* has been taken. 1 *Esplin. Rep.* 18.

What has been before said relates to *games* on cards, &c. The doctrine of the law concerning *wagers* differs from that of *play* very materially: for, in general, a wager may be considered as legal, if it be not an incitement to a breach of the peace; or if it does not affect the feelings or interest of a third person, or expose him to ridicule; or if it be not against sound policy. *Cowp.* 729: 3 *T. Rep.* 697.

And an action will lie to recover wagers fairly won, and arising on a contingency, the event of which is unknown to both parties; but it must not be for a blind to an illegal or an immoral transaction, or to conceal simony, usury, or bribery. *Cowp.* 38: 2 *Wilf.* 36: *Salk.* 344: 1 *L. Raym.* 69.

But a wager on a horse-race, where the race is for less than £50, cannot be recovered by action; the *Stat.* 13 Geo. II. c. 19, sect. 2, having prohibited such races. 4 *T. Rep.* 1. Twenty-five pounds a side is £50, within the meaning of the statute.

GARDENS.

It is said, that roots, nay even trees, belonging to a gardener, who raises plants for sale, (provided they are removable without destruction to their growth,) shall go to the

the executor, and not to the heir. For, to him, by the nature of his use and interest in them, they are personal property; they being his stock in trade, and not raised to stand for a continuance. 1 *Gilb. Evid.* 500. And much more may they be said to belong to the tenant, and not to the landlord. But this doctrine, as far as it relates to trees, can only hold good as to nurserymen, and such persons as raise plantations of trees for sale.

GIFT.

A true and proper gift or grant of a personal chattel is always accompanied with delivery of possession, and takes effect immediately. As if A. gives to B. £100, or a flock of sheep, and puts him in possession of them directly; it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense. *Jenk.* 109. Unless it be prejudicial to creditors, or the donor was under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform but upon good and sufficient consideration. 2 *Black. Com.* 441.

GLEANING.

It has been solemnly adjudged, that a right to glean in the harvest-field cannot be claimed by any person at common law; and that the poor of the parish legally settled have no such right. 1 *H. Black.* 51, 63.

GOVERNMENT-CONTRACTS.

It seems that generally, and without particular undertaking, express or implied, a public officer is not liable in
his

his personal capacity for a debt incurred on account of government. 1 *T. Rep.* 182, 674.

GROATS.

These payments must be made every Monday. *Doug.* 68.

By the 37 Geo. III. c. 85, the allowance of groats under the Insolvent Debtors Act is repealed, and prisoners are allowed sixpences.

The application for them must be after the old form, and before the end of the first term, next after the debtor is charged in execution.

By this new act, where more creditors than one desire to have a prisoner detained in prison, each shall pay weekly, on every Monday, such sum as the court shall direct, not exceeding two shillings.

GUARDIAN.

A guardian in socage may make a lease of the land in his own name until the infant come to the age of fourteen. 2 *Cro.* 98: 1 *L. Raym.* 131.

A lease for twenty-one years by a testamentary guardian of an infant is absolutely void. 1 *Wilf.* 129, 735.

A guardian by nurture cannot make any leases for years, either in his own name or in the name of the infant; but a testamentary guardian, or one appointed pursuant to the *Stat.* 12 Car. II. c. 24, is the same in office with a guardian in socage. 3 *N. Abr.* 407.

The *Stat.* 12 Car. I. enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one years; and, if no such appointment be made, the Court of Chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin. 2 *Bl. Com.* 88.

The

The mother's appointment of a guardian to her son by will is void ; the statute confining the power of appointing a testamentary guardian to the father only. 3 *Atk.* 519.

Guardians are but trustees ; and the statute, by enabling the father to devise the guardianship of his children, did no more than empower the father by will to choose a different person from him or her, that would have been guardian in socage ; a different person than what the law would have appointed, and to continue that guardianship to a different time than the guardianship in socage would have continued ; namely, until twenty-one instead of fourteen. But still a guardian, appointed according to the statute, had no more power than a guardian in socage ; and, as the court could interpose where there was a guardian in socage, so might it also do in case of a guardian by statute, both being equally trustees. So this court will and has interposed even in the case of a father. As, where the child had an estate, and the father, who was insolvent and of an ill character, would take the profits where the court had appointed a receiver. So if any wrong steps are taken by a guardian, which might not deserve punishment, yet if they were such as induced the least suspicion of the infant being likely to suffer by the conduct of a guardian, or if a guardian choose to make use of methods that might turn to the prejudice of the infant, the court will interpose and order the contrary. And this is grounded upon the general power and jurisdiction which it had over all trusts, and a guardianship is most plainly a trust. 1 *P. Wms.* 705.

HABEAS CORPUS.

In term-time, if persons are illegally imprisoned, they may have this writ in the King's Bench or Common Pleas ; but the Court of Chancery is always open, and the Lord Chancellor may grant this writ, either in term or vacation. 1 *Harr. Chan. P. introd.* p. 3.

HAWKERS

HAWKERS AND PEDLARS.

No hawker can expose goods to sale in any part of a market-town but the public market-place, by *Stat. 29 Geo. III. c. 26, sect. 16, 17: 4 T. Rep. 273.*

HEALTH.

An action will lie for injury done to the health; as by selling unwholesome food, carrying on a noisome trade, unskilful conduct in a physician or apothecary. *1 L. Raym. 214: 2 Wils. 359: 1 Roll. Abr. 190: Cro. Car. 510.*

HEIRS.

The Court of Chancery will set aside unreasonable bargains with heirs during the father's life-time: and that without regard to the age of the heir, and although the money would have been lost if the heir had died before the father. *1 Chanc. Caf. 120: 1 Vern. 167: 2 Vern. 14, 27, 121: 3 P. Wms, 131.* And it makes no difference whether it is for money lent, or goods taken up to sell again, as improvident heirs are used to do. *1 Ch. Ca. 276: 1 Vern. 467: 1 Bro. Rep. 149.*

HERIOTS.

A heriot is a render of the best beast, or other good, (as the custom may be,) on the death of a copyhold tenant. *2 Black. Com. 97.*

The lord must seize the identical thing itself, and not any other chattel for it. *Cro. El. 590: Cro. Car. 260.*

Heriots are, in some manors, due on alienation; and, where a copyholder aliens part to one and part to another, and retains part in his own hands, and surrenders to the use of the alienees, the lord shall have a heriot on every alienation. *Palm. 342: 1 Keb. 357.*

Where

Where many purchase lands jointly, a heriot shall not be paid till after the death of the survivor. 8 Rep. 105.

HIGHWAYS. — See Roads.

If highways become impassable, by the overflowing of a river or other cause, passengers may justify going on the adjoining fields. But the case is different of a private way over the land of another. For, there, if the way becomes impassable, the person who is entitled to the way cannot justify going on the adjoining lands; for, the grant of a way is only in a particular line, not to the right or left, and the granter is not obliged to repair. *Doug.* 716.

But, if it is obstructed or shut up, the person having right may maintain an action. *Cro. Eliz.* 84, 466.

The parish at large, *in the first view of the thing,** is bound to repair all highways lying within it, unless by prescription they can throw the burden† on particular persons, by reason of their tenure. 2 T. Rep. 106.

By 13 Geo. III. c. 78, two justices may alter, widen, or divert, any highway, through or over any person's soil, even without his consent, subject to the regulations specified in the act.

He who hath the lands, which lie on both sides the highway, hath the property of the soil of the highway in him, notwithstanding the public privilege of passing through it; for, the law presumes that the way was at first taken out of the lands adjoining. 2 Lill. Abr. 400.

If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road-act from the charge of repairing new roads, to be made within the township, that charge must necessarily fall on the rest of the parish. 2 T. Rep. 106.

* *Prima facie.*

† *Onus.*

The owners of land are bound to repair the fences on each side, unless otherwise provided by the act. 2 *T. Rep.* 232.

HIRING AND BORROWING. — See *Bailment*.

Hiring and borrowing are contracts, by which a qualified property may be transferred to the hirer or borrower; in which there is only this difference, that hiring is always for a price, borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed, together with the price, or stipend, (in case of hiring,) either expressly agreed upon by the parties, or left to be implied by law, according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing, accompanied with an implied condition to use it with moderation and not abuse it. 2 *Black. Com.* 453: 2 *L. Raym.* 909.

If I lend another my horse to ride so far, and he rides farther, or forward and backward, or doth not give him meat, an action lies. *Cro. Eliz.* 14. And, where one lets me a horse for a time, if he take him from me within that time, or disturb me before I have done what I hired him for, an action lies. And, though I ride the horse out of the way in my journey, he may not take him from me. 8 *Rep.* 146.

HOLDING OVER. — See *Rent*.

If there be a lease, and, after the determination of it, the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants, of the lease. 1 *H. Black.* 8.

By

By Stat. 6 Anne, c. 18, guardians, trustees, husbands, seized in right of their wives, and tenants for another's life, holding over without consent, after the determination of their interests, are made trespassers.

HOLIDAYS,

The 29th of May is not a holiday in any of the public law-offices; and, consequently, no officer can take an extraordinary fee for business done on that day. 7 T. Rep. 336. The only allowed holidays are Candlemas, the Ascension, and St. John the Baptist. *Ibid.*

HORSES.

An inn-keeper may detain a horse for his meat, but he cannot use him; for, it is in nature of a distress. *Bac. Abr.*

And, by the custom of LONDON and EXETER, if a man commit a horse to an inn-keeper, and he eat out his price, the inn-keeper may take him as his own, upon the reasonable appraisement of four of his neighbours: but this is not the general custom of the kingdom. *Id.*

And, when a horse has been once out, the power of detaining him for what was due before, does not subsist at his coming in again. 1 Str. 555.

And every horse must be sold for his own proper debt. 1 Bulst. 207.

If my horse be taken away, and I find him in a common, a fair, or public inn, I may lawfully seize him; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law. 3 Bl. Com. 5.

If a purchaser of a horse, warranted to be of a certain age, discovers that he is of a greater age, and offer him to the

the feller, who refuses to take him back, he may sell the horse, and then maintain an action against the feller on the warranty. 2 *T. Rep.* 745. See CONTRACTS.

If a horse, warranted sound, prove to be otherwise, it is not necessary that he should be returned to the feller, neither need notice be given. The notice not being given will be a presumption against the buyer, and make his proof of unsoundness more difficult. But, *Note*, this is the case where an action is to be brought on the express warranty; for, where an action is to be brought for money had and received to the plaintiff's use, an immediate return is necessary. 1 *H. Black.* 17: 1 *T. Rep.* 133.

It is therefore most prudent, in all cases, to return the horse to the feller, as soon as the unsoundness is discovered, and established in the opinion of competent judges.

But, if the warranty be accompanied with an undertaking, on the part of the feller, to take the horse again, and pay back the purchase-money; if, on a trial, he shall be found to have any of the defects mentioned in the warranty, the purchaser must return the horse as soon as the fault is discovered. 2 *H. Black.* 573.

If, on account of a horse, warranted sound, the buyer should sell him again at a loss, it seems that an action might be maintained against the original seller, to recover the difference of the price. *Id.*

It is said to have been held, that a horse which sells for above £10 ought to be sound, whether warranted or not; but it is conceived, that no exact sum has ever been made the criterion of a sound price. A sound price can only be such as, from the nature and appearance of a horse, would be a fair and full price for it, if it were in fact free from blemish and vice. And, in this case, if the purchaser afterwards discovers it to be unsound or vicious, and returns it in a reasonable time, he may recover back the price in an action for money had and received, provided he can prove the

the seller knew of the unsoundness, or vice, at the time of the sale; for, the concealment of such a material circumstance is a fraud, which vacates the contract. 2 *Chr. Bl.*

Com. c. 30, n.

If a man takes a horse to graze at 2s. a week, without any special promise to keep or re-deliver him safe, and he is stolen, the owner shall not have an action. *Moore*, 543: *Plowd.* 720: nor if he stray, if the fences are good, and reasonable care be taken.

As to the change of property of a stolen horse, by sale in a market overt, it is enacted by the *Stat. 2 P. and M. c. 7*, and *31 El. c. 12*, that every horse for sale must be openly exposed for one whole hour together, between ten in the morning and sun-set, in the public place, and at the usual times for such sales, and afterwards brought both by buyer and seller to the book-keeper of the fair or market, that toll may be paid, if due, and if not, one penny to the book-keeper, who shall enter down the price, colour, and mark, and the names, addition, and abodes, of buyer and seller. Nor shall such sales take away the property of the owner, if, within six months after the horse is stolen, he puts in his claim before some magistrate, where the horse shall be found, and, within forty days more, proves it to be his property, by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in open market. But, in case any of these points are not observed, such sale is utterly void, and the owner shall not lose his property; but at any distance of time he may seize or bring an action for his horse, wherever he happens to find him. See *MARKETS*.

HUNTING.

In an action of trespass, for breaking and entering the close of the plaintiff with horses, dogs, &c. the defendant may justify that he entered in pursuit of a fox, or other

Q

noxious

noxious animal; but he cannot justify *breaking* the earth. *Poph.* 162: 2 *Bulst.* 60: 2 *Roll. Abr.* 558: 1 *T. Rep.* 334: and this justification extends only to the pursuit of noxious animals, on the principle of *presumed* public good. As to hunting hares, Lord Chief-Justice HOLT observed, that if A. starts a hare in the ground of B. and hunts it into the ground of C. the *property* is in the hunter; but B. and C. have each their actions of trespass against him. 1 *L. Raym.* 257.

And, although a person may follow a fox with hounds over the grounds of another, yet an action of trespass will lie, if he unnecessarily trample down the hedges, or do damage which he might avoid. 1 *T. Rep.* 334.

HUSBAND AND WIFE. — See *Wife.*

Husband and wife are one person in law. It is therefore said, and that truly, that a husband cannot grant any thing to his wife; yet he may do it by the intervention of trustees: *Harg. Co. Litt.* 30: and he may surrender a copyhold to her use. 4 *Co.* 29.

If a woman, *before* marriage, with the consent of her intended husband, conveys all her stock in trade and furniture to trustees, to enable her to carry on her business separately, if the husband do not intermeddle with them, and there be no fraud, such effects (though fluctuating) shall not be liable to his debts. 3 *T. Rep.* 618.

Where, in the will of the husband, a devise is expressed to be given in lieu and satisfaction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. *Harg. Co. Litt.* 36. *b.*

If an action is brought against one for entering into another's house or field, it is no justification or excuse to say, that it was done by permission of the party's wife; for, a wife can give no permission. *Cro. Eliz.* 245.

1. *Of the interest the husband has in the wife's property.*
 If *chattel-interests* be not reduced to possession, by the husband exercising some act of ownership, no property vests in him; but they shall remain to the wife, or her representative, after the coverture is determined. 2 *Bl. Com.* 433. *Co. Litt.* 46, b.

If the husband survives the wife, he shall have the *chattels real*, as leases for years, &c. by survivorship; but he shall not have *choses in action*, unless he gets possession by suing in the wife's right during her coverture: but, if the wife survives the husband, both *chattels real* and *choses in action* will go to the wife, unless he disposes of them in his life-time; for, if he does not, he cannot dispose of them by his will. *Id.* 434. But he will be entitled to be her administrator, and may, in that capacity, recover such things as became due to her before or during the coverture. *Id.*

In those cases where the debt or chose in action will survive to the wife, the husband and wife are regularly to join in the action, as in recovering debts due to the wife before marriage, and in actions relating to her freehold or inheritance, or to injuries done to the person of the wife. 1 *Roll. Abr.* 432.

If a man marries a woman who has a term for years settled on her in trust, the husband may as well dispose of this trust, as if the legal interest was in her. 1 *N. Abr.* 289.

If land or money be devised to a wife for her separate use, without naming trustees, whereby the husband becomes entitled to the legal interest of the thing, yet, if he becomes a bankrupt, the interest is not assignable, because the husband is only a trustee. 2 *P. Wms.* 316.

2. *As to debts contracted by the wife before marriage.*
 If the wife be indebted before marriage, the husband is bound

bound afterwards to pay the debt; for, he has adopted her and her circumstances together. 3 *Mod.* 186.

But, though the husband has had a great fortune with his wife, if she dies before him, he is not liable to pay her debts contracted before marriage, either in law or equity, unless the creditor recover judgement against him in the life-time of the wife, or unless there is some part of her personal property which he did not reduce into his possession before her death, which he must afterwards recover as her administrator; and to the extent of that property he will be liable to pay his wife's debts, contracted while unmarried, which remained undischarged during the marriage. 1 *P. Wms.* 468: 3 *P. Wms.* 410.

A second husband is liable for debts contracted by his wife, while she was living in a state of separation from a former husband, and had a separate maintenance. 1 *T. Rep.* 5.

3. *As to debts contracted by the wife during marriage and cohabitation.* — Generally, the wife cannot by contract bind the husband, yet the husband is liable to debts contracted by the wife, if the things were necessary for the husband and the wife and family; but not for any thing besides. 1 *Siderf.* 210: *Osley*, 61. What are necessaries must be ascertained by a jury, from the rank and circumstances of the husband; and, if he forbids particular persons to trust his wife, he shall not be charged after such prohibition: 1 *Vent.* 42: but a general prohibition cannot amount to legal notice. *Wood's Inst.* 60.

A husband is made debtor by the act of his wife, where she has authority from him to contract; but what is evidence of this authority must be left to a jury. However, by modern resolutions, a wife cannot make a contract as the attorney or representative of the husband; and therefore, if such contract was found by special verdict, it will not bind the husband; but, if the wife agrees for goods, which are delivered to the husband, or if the wife has actually

tually contracted for her husband, this is evidence to persuade a jury that the husband hath contracted; and these acts of the wife are not substantive contracts to charge the husband, as the acts of a bailiff or servant are to bind the master, but only evidences of the husband's contracts, founded on their cohabitation. *Gilb. Ass. Debts* 360, 361.

A wife's acknowledgements, promises, &c. are good against the husband, where she usually acts in her husband's business, even against the statute of limitations. *Buller, Sittings after Trin. T.* 1786, and *1 Espin. Rep.* 142.

4. *As to debts contracted by the wife in a state of separation, by mutual consent, where she has a separate maintenance secured to her.* — A married woman, living apart from her husband, and having a separate maintenance, (secured to her by deed, as it seems, *1 Espin. Rep.* 6,) may contract and be sued as an unmarried woman. *1 T. Rep.* 5. And, if she spends the whole of her settlement and allowance, the husband will not afterwards be liable, even for necessaries. *Id.* 10. But she must be separated from her husband, and have a *fixed, certain* allowance secured to her as a maintenance. *5 T. Rep.* 679.

And it seems, that a personal knowledge of the separation of the husband and wife is not necessary in order to discharge the husband; for, if it be publicly known, in the place where the parties live, it is sufficient; for the notification need not be in the place where the wife afterwards may choose to reside. *Salk.* 116: *Caf. K. B.* 244: *S. C.*

But, where a husband is discharged from liability to his wife's debts, in respect to her having a separate maintenance, it seems it must be a provision proceeding from himself, and not from a third person. *4 Burr.* 2077, 2177.

And, while the marriage continues, their living separate does not destroy the legal rights of the husband; so that it has been held, that payment in such case to a wife, of a legacy, is not good payment. *1 Vern.* 261.

5. *Where the husband puts the wife out of doors.* — If a man puts his wife out of doors, this amounts to a general credit for necessaries: and a person who has supplied her with these, notwithstanding a warning not to trust her while she lived with her husband, shall recover against the husband. *Salk. 119: 2 Str. 1214: Gilb. Evid. 366.* But he is not bound to receive her, nor is he liable to pay for necessaries found for his wife after she has committed adultery, though he has before committed adultery himself, and turned her out of doors without any imputation on her conduct. *6 T. Rep. 603.*

Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill-treatment, it is equivalent to a turning her out of the house, and the husband is liable for necessaries supplied to her under these circumstances. *1 Espin. Rep. 442.*

6. *If she elopes.* — If a wife elopes and lives with another man, the husband is not chargeable even for necessaries. *Str. 647.* At least, if the person who furnishes them is sufficiently apprized of her elopement. *1 Lev. 5.* But she cannot be sued alone, her husband must be joined for conformity sake; and in no case can a married woman be sued alone, except in the known cases of an *alien enemy, abjuration, exile,* and the like. *2 Black. 1079, 1179, 1195: Salk. 116: 1 L. Raym. 147.*

And it seems to make no difference whether the elopement be adulterous or not. *2 Str. 875.* But in this case, probably, the husband would be liable *from the time* he should refuse to take her again.

7. *As to the custom of London.* — A married woman in London, being a sole trader, may, by the custom of that city, be sued in the city-courts without her husband. But she cannot sue without her husband in the superior courts. *4 T. Rep. 361: 6 T. Rep. 605.*

8. *As*

8. *As to reputation of marriage.* — Where a man and woman live together, not being husband and wife, the law will take them to be husband and wife, and the man will be liable. *Bull. N. P.* 136: 1 *Espin. Dig.* 123. Even though the tradesman should know that they are not man and wife. 2 *Espin. Rep.* 637.

The marriage of the parties shall not be impeached after their deaths to avoid their conveyance. 1 *Espin. Dig.* 142.

9. *Of actions for and against husband and wife.* — In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he has put in bail for himself and his wife. 1 *Vent.* 49: 6 *Mod.* 17, 86. If the wife be arrested by mesne-process, she shall be discharged on common bail; and that, whether she be arrested singly, *Cro. Jac.* 445, or jointly with her husband. 1 *Lev.* 216: 1 *Salk.* 115: 2 *Str.* 1272: 1 *T. Rep.* 486: *R. B. Barnes*, 96: 3 *Wils.* 124: 2 *Black. Rep.* 720, *S. C.*

Where an action is brought for words spoken of, or other injury done to, the wife, and is founded on the special damage of the husband, the wife must *not* join. 1 *Sid.* 314: 2 *Str.* 977.

For a battery or other *personal* injury done to the wife, they must both join; and, if she dies, the action dies with her. *Noy*, 18.

IGNORANCE.

Want of knowledge of the law shall not excuse any man from the penalty of it. *Doct. and Stud.* 1, 46: *Plowd.* 343.

Though ignorance of the *law* doth not excuse, ignorance of the *fact* does. As, if a person buy a horse or other thing in open market of one that had no property therein, and not knowing but that he had right, in that case he hath good title, and ignorance shall excuse him. *Doct. and Stud.* 309. But, if the party bought the horse out of the

market, he shall not be excused. *Ibid.* : 5 *Rep.* 83. Also, where a man is to enter into lands, or seize goods, he must see that what he doth is rightly done, or his ignorance shall be no excuse. *Wood, Inst.* 608.

When a man, intending to do a lawful act, does an unlawful one, there being a defect of will, he shall be excused; for, in this case, the will and deed do not co-operate so as to produce a criminal act. As if a man, intending to kill a thief in his own house, should kill an innocent person. *Cro. Car.* 538. But, if a man kills one he has no right to kill, thinking he had such right, it is murder, because it proceeds from criminal ignorance of the law. 4 *Black. Rep.* 27.

ILLEGAL CONTRACTS. — See *Contracts and Smuggling.*

ILLITERATE.

If an illiterate man be to execute a deed, he is not bound to do it, if none be present to read it, if required; and, if it be read false, it is void. 2 *Rep.* 311. The same law of a person blind, though lettered. 11 *Rep.* 28: *Skin.* 159.

IMMORALITY.

If a person lets his house for an unlawful purpose, or to be used in any way contrary to good morals, he cannot maintain an action for the use and occupation. 1 *Espin. Rep.* 13.

IMPRISONMENT FALSE.

In an action for battery and false imprisonment, if the plaintiff recovers but 1*s.* or 1*d.* damages, he is entitled to full costs, if the false imprisonment be proved, though it lasted but for the smallest time.

When a defendant is in custody on mesne-process,* and a discharge comes from the plaintiff, the officer is not

* All process that is not process of execution.

obliged

obliged to discharge him immediately, but shall have time to search the office. 1 *Espin. Rep.* 45.

When a person has been taken into custody on a charge regularly given to a constable, and brought before a magistrate, though the charge turns out to be groundless, and the party is discharged, an action for false imprisonment will lie. *Id.* 271: *Doug.* 358: 6 *T. Rep.* 315. *S. C.*

Using loud words in the street, though it is disorderly, is not an offence for which the party should be taken into custody; and, if a person is so taken, an action for false imprisonment will lie. 1 *Espin. Rep.* 294.

The merely giving a person in charge to a peace-officer, where the officer never takes the person into custody by tapping on the shoulder or otherwise, and the person charging immediately withdraws the charge, is not an imprisonment which will support an action. *Id.* 431.

A constable is not justified in taking a person into custody for a mere assault, unless he is present at the time of the assault, and interposes with a view to prevent a breach of the peace; but, if an affray has happened, and a wound has been given, which there is reasonable ground to suppose may end in a felony, a constable may take the person who gave such wound into custody without a warrant. 2 *Espin. Rep.* 540. See BOXING-MATCHES.

INCH OF CANDLE.

When goods are exposed to sale in this way, a small piece of wax candle about an inch long is burning, and the last bidder when the candle goes out is entitled to the lot or parcel exposed. If any difference happens in adjusting to whom a lot belongs, where several bid together, the lot is to be put up again; and the last bidder is bound to stand to the bargain, and take the lot whether good or bad. In these cases, the goods are set up at a certain price, and
none

none shall bid less than a specified sum more than another,
Merch. Dict.

INCLOSURES. — See *Encroachment*.

In the eye of the *law*, every man's land, in which he hath a several property, is inclosed and set apart from his neighbour's, if not by a *visible material* boundary, as one field is divided from another by a hedge, yet by a boundary, which, though *invisible* and *ideal*, is that which alone renders inviolable the fences of stone, or brick, or wood, and distinguishes *property* from *usurpation*, the boundary of right and of law.

INCOME. — See *Wages*.

INDIA-BONDS.

These are very convenient and profitable securities to persons who have large quantities of cash unemployed, but which they wish to have in their power on any sudden emergency. For, although they are not current in common business, they may always be sold in office-hours at any of the public offices as well as at the Stock-Exchange. They are usually for £100 each; and the seller receives the interest of the purchaser up to the day he sells. They carry 5 per cent. interest, payable the 31st of March and the 30th of September. The seller makes out the bill in the following form :

Sold to Mr. Samuel Touchcash, June 1, 1798,

One India-Bond (B. 207)	£100	0	0
Interest for 3 months	1	5	0
Premium	1	18	0
	£103	3	0

Under this, write a common receipt.

The

The interest on these bonds was raised from 4 to 5 per cent. from June 30, 1796, and the Company has resolved that they will not reduce the interest without giving six months previous notice.

INFANTS.

Infants are disabled by a maxim of law to contract for any thing but necessities for their person, suitable to their degree and quality. *Co. Lit.* 172. And what is necessary or not shall be tried by the judges, and not by a jury. *Cro. Eliz.* 583. Which maxim was grounded upon a presumption, that infants most commonly, before they are of the age of twenty-one years, are not able to govern themselves; and therefore the law takes upon itself the protection of their rights, and ordains that they shall be favoured in all things, which are for their benefit, and not prejudiced by any thing for their disadvantage. 1 *Fonblan. Eq.* 67.

The law of England, whilst it protects the imbecility of infants, still keeps in view that respect which is due to the fair claims and interest of others, and will not allow that which was intended as a shield to be turned into an offensive weapon of fraud and injustice; and, therefore, an infant, knowing of a fraud, shall be as much bound as if of age. 9 *Mod.* 38: 9 *Vin. Abr.* 415: 1 *Bro. Rep.* 353: 1 *T. Rep.* 75: 1 *Vern.* 132: 2 *Vern.* 224, 5. But it is held, that this rule is confined to such acts only as are voidable; and that a warrant of attorney, given by an infant, being absolutely void, the court could not confirm it; though the infant appeared to have given it, knowing it was not good, and for the purpose of collusion. *Siderf.* 258.

As to acts of infants being void, or only voidable, there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it. The first is voidable,

voidable, but the last absolutely void. *Parke, feft. 12, 19: 1 Roll. Abr. 730: 2 Roll. Abr. 730: 1 Roll. Rep. 408: Latch. 10: 3 Rep. 13: Hob. 96.*

As necessaries for an infant's wife are necessaries for him, he is chargeable for them, unless provided before marriage; in which case he is not chargeable, though she wore them afterwards. *1 Str. 168.* An infant is also liable to an action for the nursing of his lawful child; *nam persona conjuncta æquiparatur interesse proprio. L. Bacon's Maxims, Reg. 18.*

Where goods are furnished to the son, he is himself *prima facie* liable, if they are necessaries. If tradesmen deal with him and he undertakes to pay them, they must resort to him for payment. The father, it is true, may be liable for necessaries furnished to his son on his (the father's) credit. *2 Espin. Rep. 471.* With respect to *schooling, &c.* infants may be charged, where the credit was given *bonâ fide* to them. But, where an infant is *sub potestate parentis*,* and living in the house with them, he shall not then be liable even for necessaries. *2 Black. Rep. 1325.*

If a tailor trusts a young man under age for clothes to an extravagant degree, he cannot recover; and he is bound to know whether he deals at the same time with any other tailor. *1 Espin. Rep. 212.*

And observe, that those things are deemed necessaries for an infant which correspond with his *real* circumstances, not with his *appearance*; and the tradesman is bound in all events to observe this. *Ibid.: Cro. Jac. 360: 2 Roll. Rep. 144: Poph. 151: Palm. 361: Gouls. 168: Godb. 219: 1 Leon. 114.*

Although, at law, a contract entered into with an infant for money, even to pay for necessaries, be void, yet it is otherwise in equity; for, if one lends money to an infant

* Under the parents' power.

to pay a debt for necessaries, and he do pay it, although he be not liable at law, he is in equity. 1 *Pow. Contr.* 37: 1 *P. Wms.* 483, 559. But, if the infant misapply the money, it is at the peril of the lender. 1 *Salk.* 279, 387.

It seems, that a promissory-note, given by an infant for board and lodging, and for teaching him the business of hair-dressing, is valid, and will support an action for the money. 1 *T. Rep.* 41.

And debts contracted during infancy are good considerations to support a promise made to pay them when a person is of full age. 2 *Lev.* 144: 2 *Leon.* 215: 1 *Str.* 690: 1 *T. Rep.* 648. But the promise must be *express*. 1 *L. Raym.* 389, 421: 2 *Esplin. Rep.* 628.

Infancy may be given in evidence upon the general issue, or it may be pleaded. *Bull. N. P.* 152: 2 *Lev.* 144.

A bond without penalty for necessaries will bind an infant; but not a bond with a penalty. *Cro. Eliz.* 920: *Godb.* 219. And, to an action on a bond or deed, he cannot plead *non est factum*, but his infancy. 1 *P. Wms.* 482.

The marriage-articles of a female infant are held to be binding on her, and no subsequent act of her and her husband can avoid them. 1 *Bro. Rep.* 116: 5 *Bro. Par. Cas.* 570. But the settlement must be fair and reasonable. 1 *Bro. Rep.* 152. And must be made before marriage. 3 *Atk.* 56.

Legacies to infants cannot be paid to them, nor with reasonable safety to their parents. The safest way is to pay them into Chancery. At least they should be laid out in the 3 per Cents. in the executors' names, and clear declarations of trust signed and delivered to the parties interested, or their next friends. Mr. Morgan (*Vade Mecum*, vol. ii. p. 323) says, payment of a legacy into the hands of an infant is good.

By *Stat.* 36 Geo. III. c. 52, if, by reason of infancy or absence, legacies cannot be paid, the money may be paid into

into the Bank, and laid out in the 3 per Cents; and, if such money be improperly paid in, the Chancery may dispose thereof.

If a legacy be paid to the father of an infant, it is no good payment; and the executor may be obliged in equity to pay it over again. 1 *Vern.* 261.

INGROSSING. — See *Forestalling*.

INHABITANT.

A man is an inhabitant where he occupies land, as well as where he personally resides. 1 *Salk.* 164: 2 *Inst.* 793.

INNS AND INN-KEEPERS.

Inns were instituted for the lodging and relief of travellers. Every inn is not an alehouse, nor every alehouse an inn; but, if an inn uses common selling of ale, it is then also an alehouse; and, if an alehouse lodges and maintains travellers, it is also an inn.

If an inn-keeper refuses guests accommodations on tendering a reasonable price, he may be indicted; and is also liable to an action for damages. If his house is full, it is a reasonable excuse. 1 *Hawk. P. C.* 225: *Dier*, 158.

He may detain guests' goods till paid; but, if he lets them depart, this advantage is waved. He may also detain the person of his guest who eats, or the horses which eat, till payment is made. 1 *Salk.* 388. See *HORSES*.

He is liable to an action if the goods of his guests, being travellers, are stolen or lost. *Dier*, 266: 5 *T. Rep.* 273. But it is said to be otherwise if a man, by special agreement, boards or sojourns at an inn. *Her.* 49: 12 *Mod.* 254. Or if a special undertaking be made. 5 *T. Rep.* 273.

It

It is clear that, if the host delivers the key of the chamber, where the goods are, to the guest, and he leaves the door open and the goods are stolen, yet an action lies against him; for, he is at his peril to take care of them. 8 Co. 33, a. It seems the inn-keeper is answerable, though the guest does not acquaint him what goods, &c. he has. *Ibid.* But it is said, if a host demands such an account of the goods, and he tells him he has more or less than he has, and they are lost, the host is not answerable. *Moor.* 158.

He shall not be charged if the servant or companion of the guest embezzles them, or if the guest leaves them in the inn-yard. *Noy's Max.* 93.

The inn-keeper shall not answer for the horse that is put to pasture at the request of his guest; but, if he do it of his own head, he shall. *Ibid.* Q. If he be not answerable in the former case, if there be any want of due care?

INSOLVENT DEBTORS.

Insolvent acts are statutes passed for the purpose of releasing from prison and their debts persons, whose transactions have not been of sufficient importance, or of such a nature, as would subject them to the bankrupt-laws. Their discharge is usually from all suits and imprisonments, upon delivering up all their estates and effects real and personal, for the benefit of their creditors.

The last act of this nature passed 37 Geo. III. c. 112. It extended to persons in custody January 1, 1797, and does not discharge the future effects of the debtor; for, it hath been held in the Court of King's Bench, that the effects acquired after discharge are liable to be taken in execution for a debt due before. 6 T. Rep. 366.

INSU-

INSURANCE. — See *Assurance, Fire.*

Policies of marine-insurance are seldom effected by the party himself really interested, but generally by the intervention of a broker employed by the insured, who transacts the business with the underwriters as attorney for his principal, from whom he receives his instructions; and, if he deviates from them, he is answerable to his employer in an action on the case: like any other person, who undertakes any office, employment, trust, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and skill. It is also common for the broker to open the policy in his own name, at the same time declaring for whose use the same is made. And, as the policy may be made in the name of the broker, so also may the action be brought in his name. And such agent or correspondent is liable to an action for not insuring, which is to be tried on the same principles as an action on a policy; and the defendant is entitled to every benefit of which the underwriter might take advantage. The whole law on this subject is laid down in *Smith v. Lascelles*, where *Buller, J.* mentioned three instances, in which such order to insure must be obeyed: 1. Where a merchant abroad has effects in the hands of his correspondent here. 2. Where, though the merchant has no effects in the hands of his correspondent here, yet the course of dealing has been such, that the one has been used to send orders for insurances, and the other to comply with them. 3. If the merchant abroad sends bills of lading to his correspondent here, and ingrafts on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them; for, it is one entire transaction. 2 *T. Rep.* 187.

Where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence

consequence of which, no insurance could be procured, the merchant becomes liable to make good the loss to his correspondent. 2 *T. Rep.* 188, n.

If a merchant in *London*, acting for his correspondent, does what is usual to get the insurance effected, as if he applies to *Lloyd's* without effect, he is not bound to send to any other place for that purpose; though it may be doubtful whether he ought not to apply to the public insurance-offices, if it be customary to make application to them in such cases. 2 *T. Rep.* 188.

The underwriters have a right to go to see the ship, examine the value of the hull, the masts, and the provisions; (the value of the ship alone comprehends all those articles;) but they seldom, in fact, do this, because they know from experience the quantity of provisions necessary for the crew. 4 *T. Rep.* 206.

I. *Of the policy.* — 1. Policies of insurance are not classed with specialty contracts, not being under seal; yet they have been always held as most important and sacred agreements. So much so, that, when once they are underwritten, they cannot, without the consent of the parties, be altered by any authority whatsoever; unless there be the strongest evidence possible that they have been formed contrary to the intent and real agreement of the parties. And this special caution is used, lest a door should be opened to fraud and uncertainty into a species of contract, wherein good faith, certainty, and precision, are the essential requisites.

And it may be here very properly observed, that, in questions of insurance, which is a contract founded upon broad equitable principles, the courts of common law are bound by the same rules of decision as courts of equity.

Policies of insurance are of two kinds, *valued* and *open*; and the only difference between them is this, that, in the former, goods or property insured are valued at prime cost

at the time of effecting the policy; in the latter, the value is not mentioned, and therefore must be proved. *Doug.* 301: 3 *T. Rep.* 362.

Formerly it was usual for the insured to bring a separate action against each of the underwriters on the policy, and to proceed to trial on all. But this vexatious practice was effectually done away by LORD MANFIELD; since whose time, the court will stay the proceedings in all actions but one, upon the defendants undertaking to pay the amount of their subscriptions with costs, if the plaintiff should succeed in the cause which is tried; admitting every thing which may bring the true merits of the case before the court and jury; and undertaking not to file any bill in equity for delay, nor to bring a writ of error. The rule of court, in this case, is called "THE CONSOLIDATION-RULE."

A marine insurance may be transferred, and an action maintained in the name of the assignee. 1 *T. Rep.* 26. But the interest in policies of insurance against fire cannot be assigned without the consent of the office. See FIRE.

By the ordinances of France and other maritime countries, policies must be registered; but no such regulation prevails in England.

The policy, when effected, becomes the property of the insured. *Parke*, 4.

The courts look more to the written clauses and conditions of a policy than to the printed form, and will suffer such conditions to control the printed words. 3 *Burr.* 1555.

We will now consider, 1. What persons may be insurers. 2. What may be insured. 3. What the requisites of a policy are. 4. Of the construction of the policy.

1. *What persons may be insurers.*—By the Stat. 6 Geo. I. c. 18, two corporations are authorized for granting insurances; and, under that act, the two offices, known by the names of the *Royal Exchange Assurance Office* and the
London

London Assurance-Office, were established by charter of Geo. I.; and the object of the act was to prevent the employment of any other joint capital, which might create a competition with the established corporations; for, it does not prohibit insurances by single individuals, but by companies only. And it has been held, that the meaning of the legislature must not be confined to an avowed partnership, but that the policy is void, although one name only appears upon it, if there be a sleeping partnership. *Park*, 8: 2 *H. Black.* 379.

If the credit of any other company be in any event pledged in a contract of insurance, the contract is void; and, therefore, where a company of ship-owners engaged to insure each other's ships, and covenanted severally, and not jointly, to pay a certain sum in case of loss, in proportion to their respective shares, but, in case of the insolvency of any one of the members, all the others were to be responsible, such a contract is void. 7 *T. Rep.* 338, 341.

A trustee, a consignee, or an agent for prizes, may insure. 8 *T. Rep.* 22. So may the captain of a king's ship insure a prize. 8 *T. Rep.* 26.

2. *What may be insured.* — What is to be said on this subject goes upon the supposition, that the person making insurance is *interested* in the goods, as the law requires.

The subjects of insurance which will be here treated of are those on ships, goods, merchandizes, and the freight and hire of ships.

Bottomry and respondentia-interests may be insured. See *BOTTOMRY*.

A party cannot insure a *hope* or *expectation*, not having any interest in the subject insured. 3 *T. Rep.* 709.

The *profits* of a cargo of goods may be insured. 6 *T. Rep.* 483.

Insurances upon the wages of seamen are forbidden; but it does not seem that this regulation goes so far as to pre-

vent mariners from insuring those wages which they are entitled to receive abroad, or goods which they have purchased with such wages, in order to bring them home; but, in such a case, they are to be considered in the same light as other men. 1 *Magens*, 18. It is determined, that a sailor cannot insure either his wages, or any thing that he is to receive at the end of his voyage in lieu of wages, e. g. *slaves*. 7 *T. Rep.* 157.

Two partners purchased a ship, under a bill of sale, conformable to *Stat.* 26 G. III. c. 60; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others. It was held, that the four partners had not any insurable interest in the freight of the ship. It was also held, that the right to freight results from the right of ownership; and these four partners had neither a legal nor an equitable title to the ship. 5 *T. Rep.* 709. It appears to have been determined, that all insurances upon the property of an open enemy are void. 6 *T. Rep.* 23, 35.

But it is a question, whether policies on neutral property, though bound to an enemy's port, are void. 1 *T. Rep.* 84.

It is competent to underwriters, who have subscribed policies on ships trading to the *East Indies*, in contravention of the statute of 9 and 10 W. III. c. 44, to avail themselves of the illegality of such trading, in an action brought on the policies. 6 *T. Rep.* 723.

The *Stat.* 16 G. III. c. 5, which subjected to forfeiture all *American ships*, and all other ships, with their cargoes, trading to any part of the colonies, does not extend to the property of *Americans* on board any other ship not trading to those ports: so that an insurance on the property of *Americans*, in a *Dutch ship* from *Amsterdam* to *St. Eustatia*, is not prohibited by that act. 3 *T. Rep.* 477.

3. *Of the requisites of a policy.* — The essentials in this species of contract are, 1. The name of the person insured. 2. The names of the ship and master. 3. Whether they are ships, goods, or merchandize, upon which the insurance is made. 4. The name of the place where the goods are laden, and whither they are bound. 5. The time when the risk begins, and when it ends. 6. All the various perils and risks which the insurer takes upon himself. 7. The consideration or premium paid for the risk or hazard run. 8. The month, day, and year, on which the policy is executed. 9. The stamps required by act of parliament.

First. *Of the name of the person insured.* — It was formerly the practice to effect policies in blank, that is, without specifying the names of the persons, for whose use such insurances were made. But now, by the *Stat. 28 G. III. c. 56*, it is enacted, that it shall not be lawful for any person to effect any policy of assurance on any ship or other property whatsoever, without first inserting in such policy the name of the usual style and firm of dealing of one or more of the persons interested in such assurance, or, instead thereof, first inserting the name of the usual style and firm of the consignor or consignee of the property to be insured, or the name or firm of the person or persons, residing in Great Britain, who shall receive the order for and effect such policy, or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate such policy; and that every policy made or underwrote contrary to the act shall be void.

The husband of a ship has no right to insure for any part-owner without his particular direction, nor for all the owners in general without their joint direction. 5 *Burr.* 2727.

Secondly. *Of the names of the ship and master.* — These seem to be proper, unless the insurance be general on any ship or ships expected from a particular place.

It does not appear that any express resolution has ever been made that the name of the master shall be inserted, and there may be some doubt upon it, especially as the words of the policy are, "or whosoever else shall go for master in the said ship;" and as to the validity of insurances, under the general words, "upon any ship or ships," it was completely discussed in the case of *Kewley and another v. Ryan*, and the judgement of the court was unanimous in favour of such insurances; and that the assured had a right to recover, by such policy, whatever ship he thought proper, that fell within the terms of it. 2 *H. Black.* 343. And where, from necessity, and for the benefit of all concerned, goods have been shifted from one ship to another, the owners do not preclude themselves from recovering an average-loss, arising from the capture of the second ship. 1 *T. Rep.* 611.

Upon this *Stat.* 28 G. III. it has been held, that it is not necessary, where a policy is effected by an agent, to add the word *agent*, or any other description, to his name, in the policy itself. And that a policy effected by a broker, describing himself therein as agent, is a sufficient compliance with the statute. 1 *Bosan. and Pul.* 345.

By the *Stat.* 31 G. III. c. 54, sect. 7, for regulating the *African* slave-trade, it is necessary that the certificate of the captain having served as that act requires should be attested by the owner or owners of the ship or ships in which the service was performed; and the assured cannot recover on a policy on a ship, whose captain has not such certificate. 7 *T. Rep.* 186.

Thirdly. As to the things insured. — It must be stated, whether they are ships, goods, or merchandizes, upon which the insurance is made; and, though it may not be necessary, it is deemed prudent, to describe the goods by their marks, numbers, and packages; but this can only be done when the risk commences at home; and, in other cases, it is

is more advisable,¹ on account of the uncertainty of the lading, to insure under the general denomination of merchandize. 1 *Magens*, 8: *Parke*, 20.

On account of the perishable nature of some commodities, the underwriters of London, ever since the year 1747, have inserted a memorandum at the foot of their policy, declaring, that in insurances upon corn, fish, salt, fruit, flour, and seed, they will not be answerable for any partial loss, but only for general averages, except the ship be stranded; and that, in insurances on sugar, tobacco, hemp, flax, hides, and skins, they consider themselves free from partial losses, not amounting to £5 per cent. and that on all other goods, as well as on the ship and freight, if the partial loss be under £3 per cent. unless it arise from a general average, or the stranding of the ship, they also consider themselves discharged. This form is now used by private insurers; but it having been adjudged that a ship having run aground is a stranded ship, within the meaning of the memorandum, and that, although she was got off again, the underwriter was liable to an average or partial loss upon damaged corn, the two companies, ever since the year 1754, have altered their form, by disusing the words, "or the ship be stranded."

3 *Burr*. 1553.

There are some kinds of property, which do not fall under the general denomination of goods in a policy; and for the loss of which the underwriters are not answerable, unless they are specifically named; such as goods lashed, the captain's clothes, and ship's provisions. *Parke*, 21. But, in case of a policy on the ship and furniture, provisions sent out in a ship for the use of the crew are included.

4 *T. Rep.* 206.

And it is the safest way not to insure money under the general expression of merchandize, but specifically. *Parke*,

21: 4 *Burr*. 1966.

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Fourthly.

Fourthly. Of the name of the place at which they are laden, and to which they are bound. — On which head it is said, that a policy from London to ——— is void. *Mol. lcy*, b. ii. c. 7, sect. 14.

It is also customary to state at what port or places the ship may touch, and stay during the voyage, to avoid questions on deviation. *Parke*, 22.

Fifthly. The time when the risk commences, and when it ends. — In most foreign maritime countries, it is expressed either in their ordinances or policies, and sometimes in both, that the risk of the insurers shall commence the moment the goods quit the shore, and shall continue till they are landed at the place of their destination; and that the insurer not only runs the risk in the ship named in the policy, but also in all the boats or lighters that shall be employed in carrying the goods on-board, and also in fetching them on shore. In this country the practice is otherwise; for, our policies state, that the adventure shall begin upon the said goods and merchandizes “from the loading them on-board the said ship, and so shall continue until the said ship, &c. shall be arrived at S. and upon the said ship until she hath moored at anchor twenty-four hours in good safety; and upon the goods, till the same be there safely discharged and landed;” by which method the insurers save themselves from accidents happening to goods in lighters or boats when taking on-board, previous to the actual commencement of the voyage; yet, as the policy makes the risk to continue, till the goods are safely landed, it seems that, where ships cannot come close to the quay to unload, the insurer must continue answerable for the risk which is run in conveying the goods from the ship to the shore. But this loss can only be where an accident happens by carrying the goods on shore in the ship’s boats; for, then it is considered as a continuance of the same ship and voyage. But, where the owner of the goods brought
his

his own lighter, received the goods out of the ship, and, before they reached land, an accident happened, a special jury of merchants, under the express direction of Lord Chief-Justice Lee, found that the insurer was discharged, although the insurance was upon goods to London, and till the same should be safely landed there; and this case turned expressly upon the distinction between the goods being sent on shore in the insurer's lighters, and not by the ship's boats.

2 Str. 1236.

In England, no express time is fixed, in which the goods shall be unloaded; but there must be no unreasonable delay. In most foreign ordinances, the precise number of days is pointed out, within which the goods shall be unloaded.

The risk on the ship itself is to commence, in general, according to our policies, "from her beginning to load at ———, to continue and endure until the ship shall arrive " at ———, and hath there been moored at anchor twenty-four hours in good safety."

This is the general mode of stating the commencement of the risk on ships outward bound: when ships are homeward bound, the insurances vary, according to the special agreement of the parties.

Sixthly. The various perils, against which the underwriter insures. — These, according to the form of our policies, are so numerous, that it is hardly possible an event could happen, which is not comprehended.

The policy is frequently made with the words *lost or not lost* in it; which are peculiar to English policies, and add greatly to the risk; for, if the ship should be lost at the time of the insurance made, the underwriter is liable, if there be no fraud. *Roccus Not. 51: 5 Burr. 2803.*

And by the *Stat. 34 G. III. c. 80, sect. 10, continued by 35 Geo. III. c. 90, &c.* it is enacted, that, though the policy

policy contains the usual written words, yet that no loss or damage shall be recoverable on account of the mortality of slaves, or loss or damage by restraints and detainments by kings, &c. of Africa, when it shall appear that such loss or damage has been occasioned by any aggression for the purpose of procuring slaves, &c.

The law of England is totally silent as to the responsibility of insurers where goods are stolen by persons on-board the ship. It is certain, however, that the master is answerable for them to the owner, in his character of a common carrier. Our books are also silent as to the case of goods receiving accidents on-board by bad stowage, &c. ; but the same observation applies to this also. But, as to robberies by thieves from without, there cannot be a doubt but that the underwriter is liable ; for, this is expressly provided for by the policy.

By the *Stat. 7 Geo. II. c. 15*, after stating, that, previous to the period of passing that act, the owners of the ship were liable to the proprietors of the goods for any embezzlement or secreting of, or making away with, the goods by the master or mariners, or with their privity, to whatever amount the value might be, it enacts, that the measure of the responsibility shall be the value of the ship and freight. And by the *Stat. 26 G. III. c. 86*, the owner's responsibility is limited to the value of the ship and freight, even in cases of external robbery, without the privity of the master or mariners : and this same statute, sect. 2, wholly exempts the owners from any loss occasioned by fire.

There has been much controversy as to the commencement and determination of the risk, and the decisions of the Court of King's Bench have now, in general terms, settled, that, when a ship is insured *at and from a place*, it is meant her first arrival at that place, and that, as long as she

she is preparing for the voyage, upon which she is insured, the insurer is liable. 1 *Atk.* 548 : 2 *Atk.* 359.*

And that the outward risk upon a ship insured to Jamaica generally (that is, to no particular port of Jamaica) ends on its being moored in the first port of the island, and does not continue till she come to the last port of delivery : and that, where it is on a ship insured to Jamaica, and till moored there twenty-four hours in safety, the outward risk upon the ship ends twenty-four hours after its arrival in the first port of the island ; but that the outward policy on goods continues till they are landed. *Parke*, 38, 39.

Seventhly. The premium or consideration paid for the risk. — This is a very material part of the policy. In our policies, it is always expressed to be received at the time of underwriting. Policies are in general effected by the intervention of a broker ; between whom and the insurers open accounts are kept by the usage of trade, and who are therefore, it seems, liable to the insurers for premiums received to their use, notwithstanding it be admitted, by the words of the policy, that the premium was already paid. As to the question upon this acknowledgement of the premium being paid, it remains uncertain, whether, in case the premium were not actually paid, the underwriter can maintain an action for it against the owners ; and there may be some reasonable doubt against it, because the assured would be able to produce in evidence the underwriter's own subscription.

The question did once come collaterally before the court, (*Airy and others, assignees of Milton, v. Bland*, at Guildh. 14 G. III.) but the verdict was general, and nothing was decided specially on this point. It appeared, however, by the evidence given in that case, to be generally understood,

* But if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven, years, with the owner's privity, it shall never be said the insurer is liable.

that,

that, where the insured fails, the underwriter comes upon the broker, and the broker upon the effects of the insured. The underwriters in London seldom know who the insured are, but look to the brokers only for payment. *Parke*, 26, 27.

Eighthly. The day, month, and year, on which the policy is executed, must be inserted. And,

Ninthly, It must be duly stamped; as to which, see the end of this article, INSURANCE.

4. *Of the construction of the policy.* — Policies of insurance must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the *strictum jus*, or *apex juris*, i. e. the strict and literal meaning of the words; and, as policies are to be literally construed, whatever is done by the master in the usual course for good cause, though a loss happens thereon, the insurer is liable. 1 *Burr.* 348. No rule is more generally followed in this construction than the course and usage of trade and voyages, with respect to the particular voyages or risks to which the policy relates. *Skin.* 243.

As the printed form of a policy does not in every instance suit the meaning of the parties, it is common to add to it such written clauses and conditions as suit the nature of the intended contract; and, as these written clauses are additions to, and explanations of, the printed form, the courts, in their contemplation of policies, view the written additions as containing the essential indications of the real contract; and, wherever a question arises between the printed form and the written clauses, the latter are always suffered to controul the former. 3 *Burr.* 1555.

If a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. 1 *H. Black.* 254.

A policy on a ship generally from A. to B. was construed to mean till the ship was unloaded; but, if it contain the usual

usual words, *till moored at anchor twenty-four hours in safety*, the insurers shall be answerable for no loss that happens after the time; even though the loss were occasioned by an act done during the voyage insured. 1 *T. Rep.* 252.

But, where the captain, the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine, the underwriters were held liable for a subsequent loss; for, the ship could not be said to have moored twenty-four hours in safety, although she did not go back for some days; for, the words *in good safety* must mean the opportunity of unloading and discharging. So, in the case of an embargo, where she is afterwards condemned as a prize. 2 *Sir.* 1243: *Peake*, 211: *Parke*, 35.

In an insurance on freight, if an accident happens to the ship, before any goods are put on-board, which prevents her from sailing, the insured cannot recover the freight, which he would have begun to earn if the goods had been shipped.

2 *Sir.* 1251. But, if the policy be a valued policy, and part of the goods be on-board when the accident happens, the rest being ready to be shipped, the insured may recover to the whole amount in the policy. 2 *T. Rep.* 362: 6 *T. Rep.* 478: 1 *Sir.* 1265.

If a ship from stress of weather is in a bad condition, and goes to the nearest place to refit, it is to be considered in the same light as if she had been repaired at the very place from which the voyage was to commence, and no deviation from the terms of the policy. 1 *Atk.* 545.

Where a ship is insured "at and from *Bengal* to *England*," the words mean the first arrival at *Bengal*; and it was agreed, that, when such words are used in policies, the first arrival is always implied and understood. 1 *Atk.* 548.

Where there was an insurance on the ship on the outward and homeward bound voyage, and the latter ran "at
" and

"and from *Jamaica to London*," it was held, that the homeward risk began when the ship moored at any part of the island; and that there the outward risk ended, and did not continue till she came to the last port of delivery. But the outward risk on goods continues till they are landed. 1 *Black. Rep.* 417, 418: *Parker*, 39: 1 *Burr.* 341, 348.

The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. 1 *Burr.* 341.

In general, whatever is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy; and to make a part of it as much as if it were expressed. *Ibid.*: 4 *T. Rep.* 206.

It would seem that, if a ship be driven a mile on shore by a hurricane or by an earthquake, or be burnt in a dry dock while repairing, the insurer is liable. *Ibid.*

Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that, whether it be recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage is but for a year. And this position as to the usage of traders will operate so as to protect the insured from injuries which happen through apparent delays, intermediate voyages, or other circumstances, that are usual in such voyages. *Doug.* 284, 492: 3 *Burr.* 1707: *Parker*, 49, 50.

But, notwithstanding the general rule be so, yet the parties contracting may, by their own agreement, prevent such latitude of construction. In order to which it is not necessary that express words of exclusion should be inserted in the policy; but if, from the terms used, the court can collect that such was the intention of the parties, that construction which is most agreeable to their intention shall prevail. 3 *Burr.* 1707: *Parker*, 51.

And,

And, although the judges have been thus liberal in giving effect to the intention of the parties, yet they have never extended these equitable principles so far as to say, that, when a man has insured one species of property, he shall recover damage, which he has suffered by the loss of property of another description. Thus, a man who has insured a cargo of goods cannot recover, under such a policy, the freight which he has paid for the carriage of that cargo; nor shall he, who insures the ship merely, have satisfaction for the loss of merchandize laden therein; or have from the insurers extraordinary wages paid to the seamen; or the value of provisions consumed by the detention of the ship at any port longer than was expected, though to repair damages, or by an embargo. *Parke*, 53, 54: 1 *T. Rep.* 127. But in a later case it has been held, that provisions consumed by fire were protected under an insurance of the furniture of the ship. 4 *T. Rep.* 206.

In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover. 1 *T. Rep.* 130, n. (a).

In the construction of a policy *upon time*, the same liberality prevails as in other cases. *Parke*, 58: *Doug.* 509. — *Note.* By the 35 Geo. III. c. 63, no policy upon any ship, or interest therein, shall be made for any longer term than twelve calendar months.

In an insurance at and from *Liverpool to Antigua*, with liberty to cruise *six weeks*, the meaning is a connected portion of time, and not a desultory cruising for six weeks at any time. *Doug.* 509.

In an insurance on a *Greenland ship*, the fishing-lines and tackle were determined not to be protected under an insurance of the ship, tackle, and furniture. *Hoskins v. Pickersgill*, *B. R. Easter*, 23 Geo. III.: *Parke*, 56.

II. Of

II. *Of losses*. — 1. *Of losses by perils of the sea*. — It may in general be observed, that every thing which happens to a ship in the course of her voyage by the immediate act of God, without the intervention of human agency, is a peril of the sea, and includes accidents happening by the violence of winds or waves, lightning, driving against rocks, stranding of the ship, or by any other violence, which human prudence could not counteract, and for all these the insurer must answer. But, if a ship be driven by stress of weather on an enemy's coast, and is there captured, it is a loss by capture, and not by peril of the sea. 1 *Shower*, 323: *Roccus Not.* 64: *Peake*, 212.

In cases where the loss is not total but partial, arising from a leak, from the stranding of a ship, or from the loss of her masts, cables, or rigging, the insurers upon the cargo are liable to restore the value of all the damaged goods; and the underwriter upon the ship is answerable for all the injury which she has sustained. 1 *Magens*, 52, 76: *Parke*, 61.

If a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she has foundered at sea. 2 *Str.* 1199. In England, no time is fixed, within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. A practice, however, prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any part of Europe, or within twelve, if for a greater distance. *Peake*, 64.

Where a ship's bottom is during a voyage insured, and she is taken by the worm, in consequence of which she is incapable of proceeding on her voyage, and is condemned, this is not a loss by perils of the sea, within the meaning of the policy. 1 *Espin. Rep.* 444.

Upon

Upon an insurance on slaves against perils of the sea, their death, by failure of sufficient provisions, occasioned by delays in the voyage through bad weather, is not a loss within the policy, but a loss by natural death, which cannot be insured against since the *Stat.* 30 Geo. III. c. 33, sect. 1, and 34 Geo. III. c. 80: 6 *T. Rep.* 656.

In the case of an insurance upon slaves, free from an average-loss under £5 per cent. for loss from insurrection, and a loss takes place from insurrection, the loss must be calculated in its proportion to the cargo when it happened, and not when the whole cargo was sold. 1 *Esplin. Rep.* 446.

Where a ship was insured for six months, and three days before the expiration of the time she received her death's wound, but was kept afloat by pumping till three days after the time, the underwriter was held discharged. 1 *T. Rep.* 261.

Where a ship has been repaired, the underwriters are not entitled to the usual deduction of one-third new for old, unless the ship has been put into the free possession of the owner again. 2 *T. Rep.* 407.

The assured upon a valued policy on freight is entitled to recover the whole amount; though part of the goods only were on-board at the time the ship was lost, the rest being ready to be shipped. 3 *T. Rep.* 362.

2. *Of losses by capture.* — The law upon this subject is, that, if a ship be in fact captured by the enemy, she is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. 2 *Burr.* 694.

If, either before or after condemnation, the owner recovers her, and has paid salvage, the insurer must pay the loss so actually sustained. *Stat.* 29 Geo. II. c. 34, sect. 4: 33 Geo. III. c. 66, sect. 42. And, if the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefit of the restitution.

A capture having been illegal, but the charges and delay being great, the insured made a compromise *bonâ fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. 2 Burr. 683: 1 Black. 313.

As the law now stands, by the Stat. 29 Geo. II. c. 34, sect. 24, and 33 Geo. III. c. 66, sect. 42, the right of the owner in case of a re-capture is preserved to him for ever, upon payment of stated salvage to the re-captors: viz. one-eighth if the re-capture is by any of his majesty's ships, and one-sixth if by a privateer or other ship. In cases of capture at this day, the underwriter is immediately responsible to the insured; but, if a ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. Parke, 77.

Or, if a ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution. *Ibid.*

3. *Of losses by detention of princes.* — The underwriters, by express words, undertake to indemnify against all damages arising from the detention of kings, princes, and people. People mean the governing powers of the country. 2 Burr. 696: 4 T. Rep. 783.

A detention is said to be an arrest or embargo, in time of war or peace, laid on by the public authority of a state. *Lex Merc.* 260.

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurers. 1 Magens, 67: Parke, 79.

In case of a detention of a foreign power, which, in time of war may have seized a neutral ship in order to be searched for enemy's property, the charges consequent thereon must be borne by the underwriter. *Ibid.*

But

But a detention for nonpayment of customs, or for navigating against the law of the countries where the ship happens to be, shall not fall on the underwriter. 2 *Vern.* 176.

The insurers are liable for the payment of damage, arising by the detention or seizure of ships by the government of the country in the loading-port, before the commencement of the voyage, but after the risk commenced, where the risk is "at and from." 2 *L. Raym.* 840: 2 *Salk.* 444: *Parke*, 81. But, *Q.* whether this applies to a detention by our own government? *Bischoff v. Agar*, *E.* 1797: *Parke*, 81, *b. n. a.*

Before the insured can recover, in case of detention, he must abandon to the insurer whatever claims he may have to the property insured. *Parke*, 82. But the assured must make his election speedily. *T. Rep.* 608. See *Of Abandonment, sub.*

A detention by particular ordinances, which contravene or do not form a part of the law of nations, is a risk within a policy of insurance. *Salloucci v. Johnson*, *B. R. Hill.* 25 *Geo. III.*: *Parke*, 363, 364.

4. *Of losses by the barratry of the master or mariners.* — "Barratry," says *Poslethwaite*, "is committed when the master of the ship, or the mariners, cheat the owners, or insurers, whether by running away with the ship, sinking her, deserting her, or embezzling the cargo: or by carrying a ship a course different from their orders." 1 vol. p. 214, 136. So that, any act of the master or mariners, which is of a criminal nature, or which is grossly negligent, tending to their own benefit, and the prejudice of the owners of the ship, without their consent or privity, is barratry. 2 *Str.* 1473: *Cowp.* 143: 1 *T. Rep.* 325. The insurers by express words undertake generally against barratry of the master and mariners.

It is barratry in the master to smuggle on his own account. 1 *T. Rep.* 252.

It is not necessary to make the insurer liable that the loss should happen in the very act of barratry. And it is immaterial whether it take place during the fraudulent voyage, or after the ship has returned to the regular course; for, the moment the ship is carried from its proper track, with an evil intent, barratry is committed. *Cowp.* 143, 155.

A ship being insured for a voyage, the underwriter is not liable for any loss arising from seizure *after he has been twenty-four hours in port*; though such seizure was in consequence of an act of barratry committed by the master, by smuggling *during the voyage*. 1 *T. Rep.* 252.

But the loss, in consequence of the act of barratry, must happen during the voyage insured, and within the time limited in the policy. 1 *T. Rep.* 252.

If the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. *Ibid.*

A deviation through the ignorance of the captain, or from any other necessity, not fraudulent, though it avoids the policy, does not constitute an act of barratry. 7 *T. Rep.* 505.

If the owner of a ship freight it out for a specific voyage, the freighter is to be considered for this purpose as owner; and, if the master commit a criminal act without his privity, though with the knowledge of the original owner, it is barratry. *Cowp.* 143, 154.

There must be fraud to constitute barratry; and, therefore, if a vessel deviates from her voyage through the ignorance of the captain, it does not amount to barratry. 7 *T. Rep.* 505.

Where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed, and where the master was to have no benefit by the change, it was held not to be barratry. 2 *Str.* 1173.

So

So if a ship take a prize, and, instead of proceeding on her voyage, the captain is compelled by the mariners to return and part with the prize against the orders of his owners, the captain is justified by necessity; and it is not barratry, because it is not done to defraud the owners. 2 *Str.* 1264.

If the captain cruise for and take a prize contrary to his owners instructions, it is barratry. 6 *T. Rep.* 579.

Where the captain goes out of the course of the voyage to take in goods on his own account, with the knowledge of the owner of the ship, but not of the freighter for that voyage, it is barratry. *Cowp.* 143.

An act of the captain with the knowledge of the owners of the ship, though without the privity of the owners of the goods, who happened to be the person insured, is not barratry. *Ibid.*

Q. If a breach of an embargo is an act of barratry?

If the master of the ship be also the owner, he cannot be guilty of barratry, even though he has mortgaged the ship. 1 *T. Rep.* 323.

If the words "in any lawful trade" be inserted, still the underwriters are liable, if the captain commit barratry by smuggling on his own account. 3 *T. Rep.* 277.

And the stipulation respecting the employment of the ship in a lawful trade must be applied to the trade in which the owners employ her. *Ibid.*

Where a voyage insured was from *Jamaica* to *New Orleans*, which lies up the river *Mississippi*, and the captain dropped anchor at the mouth of the river, and went up the river in a boat for a fraudulent purpose of his own, it was held, that the dropping of his anchor, with such fraudulent intent, was an act of barratry, and not merely a deviation. 4 *T. Rep.* 33.

If any captain or mariner belonging to any ship shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, or of any person underwriting thereon, or to the prejudice of the owner of the ship, he shall suffer death as a felon without benefit of clergy. *Stat. 1 Anne, c. 9, sect. 4.*

If the offence be committed within the body of a county, the offender shall be tried at common law; if on the sea, agreeable to the direction of the *Stat. 28 Hen. VIII. c. 15.*

5. *Of losses total and partial, and of adjustment.* — Losses are either total or partial and average. When we speak of a *total* loss, an irrecoverable loss is not intended; but that, by some of the perils mentioned in the policy, the property insured is in such a condition as to be of little use or value to the insured, and so injured as to justify him in abandoning to the insurer, and in calling on him to pay the whole amount of his insurance, as if a total loss had actually happened. *Parke, 98.*

Partial loss implies a damage done to the ship or cargo, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole or a great part thereof may arrive in port; which loss falls on the owner of the property damaged, who must be indemnified by the underwriter. *Id. 100: 2 Burr. 1172.*

The nature of a policy on a ship is *on the ship for the voyage*. If, therefore, either the *ship* or the *voyage* be lost, it is a total loss. *1 T. Rep. 191.*

If a ship arrive safe, the circumstance of her not being worth repairing will not make it a total loss. *1 T. Rep. 187. See Of Abandonment.*

The underwriters in London expressly declare, as appears by a *memorandum* at the foot of the policy, that they will not answer for partial losses, not amounting to £3 per cent.; but they indemnify against losses, however considerable,

derable, that arise from a general average; because that can never happen but in case of imminent danger, when it is for the common interest that such expenses should be incurred.

Upon the subject of perishable goods, (*i. e.* corn, fish, salt, fruit, flour, and seed,) concerning which the London underwriters expressly declare in their memorandum that they will not be answerable for any *partial* loss, it has been uniformly held, that the underwriters can in no case be answerable for a *partial* loss to such commodities; and that no loss shall be deemed *total* but the absolute destruction of the thing insured by the wreck of the ship; for that, while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of the memorandum. Under the word *corn* in that memorandum it is held, that *peas*, *beans*, and *malt*, are included; but that the term *salt* does not include *salt-petre*. *Parke*, 112.

As to the mode of ascertaining the amount of losses, the case of *Lewis v. Rucker*, reported 2 *Burr.* 1167, is generally resorted to as the standard of decisions on this subject. And by that case it appears that, when a *total* loss happens, the insured is entitled to recover against the underwriter as soon as he has proved the value of the thing insured at the outfit,* which must be ascertained wholly independent of the rise or fall of the market, or the schemes or speculations of the merchant; but, when the value is inserted in the policy, the insurer is bound by it; and nothing remains but to prove that the goods were on-board the ship, (1 *Magens*, 25: 2 *Burr.* 1167, 1170: *Parke*, 104,) unless the defendant can shew that the plaintiff had a colourable interest only, or that he had greatly over-valued the goods. *Parke*,

* When no valuation is stated in the policy, the invoice of the cost, with the addition of all charges and premium of insurance, shall be the foundation upon which the loss shall be computed. 1 *Magens*, 37.

211. But, where the loss is *partial*, the value in the policy can be no guide to ascertain the damage, which then necessarily becomes a subject of proof as much as in the case of an open policy. *Parke*, 103.

When the quantity of damage, sustained in the course of the voyage, is known, and the amount which each underwriter is to pay is settled, it is usual for the underwriter to indorse on the policy, "Adjusted this loss at so much per cent." This is called "*an adjustment*." *Parke*, 117.

It has been determined, that after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into a proof of his loss, or any of the circumstances respecting it. But, if there be any misconception of the law or fact, it is otherwise. *Beawes Lex Merc.* 310: *Parke*, 117.

And if an insurer pay money for a total loss, and in fact it be so at the time of adjustment, if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured: but he is entitled to all the advantages that may arise from the salvage. *Parke*, 118.

It for a long time remained a question, whether the words, "unless stranded," were to operate as a condition, so as to allow the assured to recover for a partial loss of the commodity, if that event happened, though it could be shewn that no part of the loss had arisen immediately from the act of *stranding*. And this, after much discussion, in the case of *Burnett v. Kensington*, was at length decided, by the whole court, in favour of the assured. 7 *T. Rep.* 210: *Parke*, 115, c.

In a late case, Lord KENYON told the jury, that a ship, running on some wooden piles, four feet under water, erected in *Wishbeach* river, about nine yards from the shore, but placed there to keep up the banks of the shore, and lying on such piles till they were cut away, was a *stranding* within the policy, so as to subject the underwriter to an average

average loss on corn. *Dobson v. Bolton, Sittings after E.* 1799. *Parke*, 111.

III. *Of general or gross average.* — The word *average*, in commercial affairs, bears four different significations:

1. When goods or merchandizes, carried by sea, are thrown overboard in a storm, for the purpose of lightening a ship; or masts or cables are cut away; the owners of the ship, and of the goods saved, contribute for the relief of those, whose goods are so thrown overboard, proportionably. This is called general or gross average, and it is chargeable on the underwriters. *Lex Merc. Red.* 247. —
2. It also signifies “a particular partial loss.” —
3. Small or petty averages are such charges and disbursements as, according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage; such as towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, signals, instructions, passage-money by castles, digging a ship out of the ice; and, at London, by custom, the fee paid at *Dover-pier*: but these never fall on the underwriters. One-third is borne by the ship, and two-thirds by the cargo, unless they are incurred for any extraordinary purpose, or to relieve the ship and cargo from some impending danger; in which case they would fall on the insurer. In lieu of these petty averages, it has become usual at some places to pay £5 per cent. calculated on the freight; and £5 per cent. more for primage to the captain. 1 *Mag.* 72: *Parke*, 100. —
- The last species of average is that which we are accustomed to meet with in the bills of lading, “paying so much freight for the said goods, with primage and average accustomed.” In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care.

Average,

Average, in the sense in which we are now to consider it, is a contribution to a general loss; and, in that sense, the words *average* and *contribution* are synonymous.

According to *Beawes*, (*Lex Merc.* 148,) three things must concur to make the throwing goods overboard lawful: —

1. That what is so condemned to destruction be in consequence of a deliberate and voluntary consultation between the master and the men.

2. That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest.

3. That the saving of the ship and cargo be owing to the means used with that sole view: but the second point seems to be the only material and essential one.

If the *jettison* (that is, the throwing over the goods) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved. But, if the ship, being once preserved by such means, be afterwards lost, the property saved from the second accident shall contribute to the loss occasioned by the former *jettison*. *Parke*, 123.

The most obvious accidents and charges, that will entitle the party suffering to call on the rest for a contribution, are, damage sustained in defending a ship against an enemy or pirate; the expense of curing and attendance upon the officers and mariners wounded in such defence; and the price which the master may have promised to pay for the ransom of his ship, to any privateer or pirate, when taken. A master, who cuts away his mast, parts with his cable, or abandons any other part of the ship or cargo, in a storm, to save the ship, is entitled; but, if he should lose them by the storm, the loss falls only on the ship and freight. *Beawes Lex Merc.* 148: 1 *Magens*, 64: *Parke*, 124.

It

It is not only the value of the goods thrown overboard, that must be considered in a general average, but also the value of such as receive any damage by wet, &c. from the jettison of the rest. *Beawes*, 148: *Parke*, 124.

Where a ship is obliged to go into port, for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *Beawes*, 150: *Molloy*, l. ii. c. 6, sect. 8: *Parke*, 124.

And, in cases where no determination of our courts has been made, the mode, on which they must be decided, is, by considering whether these expenses come within the perils stated in the policy, and were necessarily and unavoidably incurred for the general safety of the ship and cargo. *Parke*, 125.

It may be collected, that the ship, freight, and cargo, are to bear an equal and proportional part of what was so sacrificed for the common good; and the custom has become general of estimating the goods saved and lost at the price for which the goods saved were sold, freight and all other charges being first deducted; and money and jewels (which are a part of the cargo) fall into the general average at their full price. But it is said, that those things that are borne on a man's body, the ship's provisions, respondentia-bonds, and the like, are excluded from contribution. *Parke*, 127, 128, 129.

The contribution is in general not made till the ship arrives at the place of delivery; but accidents may happen which may cause a contribution before she reach her destined port. Thus, when a vessel has been obliged to make a jettison, or, by the damages suffered, soon after sailing is obliged to return to her port of discharge, the necessary charges of her repairs, and the replacing the goods thrown overboard,

overboard, may then be settled by a general average. *Parke*, 128.

It is usual for the owners of the goods preserved, and also for the owner of the ship, to pay their average to the sufferers, on receipt of their goods and on delivery of the ship; and they have their remedy over against the underwriters.

The way of fixing a right sum by which the average ought to be computed can only be by examining what the whole ship, freight, and cargo, if no jettison had been made, would have produced nett if they had all belonged to one person and been sold for ready money. And this is the sum whereon the contribution should be made, all particular goods bearing their nett proportion. 1 *Mag.* 69.

If an insurance be effected on fruit, and the policy contains the usual memorandum, "corn, fruit, &c. warranted free from average, unless general or the ship be stranded," and the ship be in fact stranded, the underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arise from the act of stranding. 7 *T. Rep.* 210.

Note. — Underwriters do not insure against any loss that may arise from the difference of exchange. 1 *Espin. Rep.* 77.

IV. *Of salvage and ransom.* — Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies. *Beawes Lex Merc.* 145.

When a ship has been wrecked, the law of England, by various statutes, declares, that reasonable salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace. 12 *Anne, Stat.* 2, c. 18; 26 *Geo. II. c.* 19.

If

If any prize taken from the enemy shall appear to have belonged to any of his majesty's subjects, it shall be restored to the former owner, upon his paying, in lieu of salvage, one eighth of the value, if retaken by one of his majesty's ships; but, if by a privateer or other ship, one sixth. 33 Geo. III. c. 66, sect. 42.

Wearing-apparel of the master and seamen are always excepted from the allowance of salvage. *Beawes, Lex Merc.* 147.

The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively, if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices. *Beawes*, 147.

Insurers by their policy expressly undertake to bear all expenses of salvage. *Parke*, 140.

If the insurer pay to the insured the expenses of salvage, and, from particular circumstances, the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss. 1 *Vez.* 98.

Where the salvage is high, the other expenses great, and the object of the voyage is defeated, the insured is allowed to abandon to the insurer, and call upon him to contribute for a total loss. *Parke*, 141.

There is neither average nor salvage upon a bottomry-bond in England. *Joyce v. Williamson*, B. R. Mich. Term, 23 Geo. III.: *Parke*, 421.

By Stat. 22 Geo. III. c. 25, and 35 Geo. III. c. 66, sect. 37, it is declared illegal for captains or owners of ships to ransom themselves from the enemy; and, if they do, they are liable to a fine. And as, in such case, the money paid to regain the possession of a ship would be illegally paid, it consequently cannot contribute to a charge on the underwriter. 8 *T. Rep.* 277.

In

In the case of *Havelock v. Rockwood*, (8 *T. Rep.* 277,) the plaintiff's ship was captured by the enemy; but, before she was condemned as a prize, was put up to auction and bought by the plaintiff. The only point in this case was, whether this was a *sale* or a *ransom*; and it was the opinion of the court, that it could not be a sale, because there was no property in the captor for want of a sentence of condemnation; and the captured was in possession under his former title. The court also considered, that its being done on *land* and in the form of an *auction* made no difference; for, that it was in substance a *ransom*, and within the mischief, against which the statutes were meant to guard.

V. *Of abandonment.* — Before the insured can demand a recompense from the underwriter for a total loss, he must cede or abandon to him all his right to all the property that may chance to be recovered from shipwreck, capture, or any other peril stated in the policy. And, when the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation. *Parke*, 143: 1 *Vez.* 98.

The insured may in all cases choose not to abandon, but he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 2 *Burr.* 697.

The insured may abandon, and call on the underwriter for a total loss, if the damage exceeds half the value; if the voyage be absolutely lost, or not worth pursuing; if farther expense be necessary, or if the insurer will not engage at all events to bear that expense, although it should exceed the value or fail of success. But he cannot abandon, unless at some period or other of the voyage there has been a total loss. Nor, if neither the thing insured nor the voyage be lost, and the damage does not amount to a moiety of the value. 1 *T. Rep.* 191. And it has been solemnly determined, that the right to abandon must depend on the nature

nature of the case at the time of the action brought, or at the time of the offer to abandon: and, therefore, in case of a capture and re-capture, if it appears that, at the time of the offer to abandon, the peril was over, as that the ship was safe in port, and had suffered no loss, the court held, that the insured had no right to abandon. 2 Burr. 1198: 1 Black. Rep. 276.

Abandonment must be made, though the property be converted into money. Parke, 172.

It is now held, that, as soon as the insured receives accounts of such a loss as entitles him to abandon, he must, in the first instance, make his election whether he will abandon or not; and, if he abandon, he must give the underwriters notice in a reasonable time, otherwise he waves his right to abandon, and can never after recover for a total loss. 1 T. Rep. 608.

Where the voyage is lost, but the property is saved, the owners may abandon. Ibid.

If the insured, hearing that the ship is disabled, and has put into port to repair, express a desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. 2 T. Rep. 407.

On a wagering policy, the insured cannot abandon. 1 T. Rep. 304.

A ship was insured from Wyburg to Lynn, at which place she arrived. The jury found that the ship was not worth repairing, but the damage sustained in the voyage insured did not exceed £48 per cent. it was held, that the jury had precluded the court from saying this is a total loss; and, where neither the thing insured nor the voyage is lost, the insured cannot abandon. 1 T. Rep. 187.

Insurance

Insurance on ship, her cargo, and freight, at and from *Tortola* to *London*, warranted free of particular average. On the first of August, the whole fleet got under way; but, not being able to get clear of the islands, they anchored that night, and next day got clear. About ten o'clock on the second of August, several squalls of wind arose, which occasioned the ship to strain and make water, so that the crew were obliged to work both pumps. On the third, the captain made the signal of distress, and returned to *Tortola*. A survey was made, and the ship declared unable to proceed to sea with her cargo; that she could not be repaired in any of the English West-India islands; and that many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. The ship and the whole of the cargo were accordingly sold at *Tortola*. This was held to be a total loss, the voyage being entirely defeated. *Manning v. Newnham*, *Trin.* 22 Geo. III. : *Parke*, 168.

Q. Whether the insured can abandon where barratry has been committed by smuggling? 1 *T. Rep.* 252.

A ship and goods being insured for a voyage, if the ship is taken and re-captured, and, after the re-capture, the captain, acting fairly for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured may abandon, and recover as for a total loss. 1 *Doug.* 231.

A policy of insurance on a ship and stores "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c. extends to an embargo laid on by the government of that country in the loading-port. And, if the embargo continue, the assured may abandon, and recover as for a total loss. 6 *T. Rep.* 413.

VI. *Of fraud in policies, and of warranties and representations.* — Policies are annulled by the least shadow of fraud,

fraud, or undue concealment of facts: both parties are therefore equally bound to disclose all circumstances within their knowledge. So that, if the underwriter, at the time he underwrites, knows that the ship is safe arrived, the contract will be equally void, as if the insured conceals any known accident that has befallen the ship. 1 *Black. Rep.* 594: 3 *Burr.* 1909.

Cases of fraud are reducible to three heads. 1. False allegations. 2. The suppression of the truth. 3. Misrepresentation.

1. It is determined that the policy shall be void if goods are insured as the property of an ally, or as neutral property, when they are in fact the goods of an enemy; and such false assertions in a policy will vitiate the contract, though the loss happen in a way not affected by that falsity. *Skin.* 327: *Doug.* 247: 1 *Black.* 427.

2. Concealment of circumstances vitiates all contracts of insurance. The facts, upon which the risk is computed, lie, for the most part, within the knowledge of the insured only; the underwriter must therefore rely upon him for all necessary information, and must trust to him not to conceal any thing so as to make him form a wrong estimate. If a mistake is made without any fraudulent intention, still the contract is annulled, because the risk is not the same which the underwriter intended. 3 *Burr.* 1905: 1 *Black. Rep.* 465, 594: 2 *P. Wms.* 170: 2 *Str.* 1183: *Doug.* 238: *Parke*, 181, 195.

But there are many matters as to which the insured may be innocently silent. 1. As to what the insurer knows, however the insured obtained his information. 2. As to what the insurer ought to know. 3. As to what lessens the risk. And here we may remark, that the insurer ought to know political perils, as to the state of war or peace; the nature and danger of every voyage which may be called natural perils. If he insures a privateer, it is under-

stood that he is not to be informed of its destination : and, as men reason differently from the same facts, he need not be told another's conclusion from known facts. In short, the question, in cases of concealment, must always be, " whether there was, under all the circumstances at the " time the policy was underwritten, a fair statement or a " concealment ; fraudulent, if designed ; or, if not de- " signed, varying materially the object of the policy, and " changing the risk understood to be run." 1 *Black.* 465, 594 : 2 *P. Wms.* 170 : 2 *Str.* 1183 : 3 *Burr.* 1905 : *Doug.* 238 : *Parke*, 181, 182, 195.

3. The distinction is clear which exists between a *warranty*, which makes part of the written policy, and must be strictly complied with, and a collateral *representation*, not forming part of the written policy, and which is satisfied, if it be substantially performed. *Cowp.* 785.

If there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement, as in the case of warranty. And, if a representation be false in any material point, even through mistake, it will avoid the policy, because the underwriter has computed the risk upon circumstances which did not exist. 5 *Burr.* 1909.

In all these cases of fraud, wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested or of his agent ; for, in either case, the contract is founded in deception, and the policy is consequently void. And this rule prevails, even though the act cannot be at all traced to the owner of the property insured. 1 *T. Rep.* 12. And, therefore, where an insurance was ordered by the principal to be made as soon as a letter was received from his agent, and that agent, when he wrote the letter, knew nothing of the loss of the vessel, but had an opportunity, by the course of the post, of contradicting the contents of it, and transmitting intelligence
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of the loss before the policy was offered, and neglected to do it; the policy is void, on the ground of misrepresentation, though the assured himself knew nothing of the loss.
Ibid.

A policy will not, however, be set aside on the ground of fraud, unless it be fully and satisfactorily proved; and the burden of the proof lies on the person wishing to take advantage of the fraud. At the same time, positive and direct proof is not to be expected; and, from the nature of the case, circumstantial evidence is all that can be given. And every case of fraud must depend upon its own circumstances. *Roccus, Not. 51, 78.*

VII. *Of sea-worthiness.* — The sea-worthiness of the ship is an implied condition in this species of contract; and, therefore, a previous representation of the condition of the ship is not necessary. The whole doctrine on this subject was settled in the case of the *Mills* frigate, where the insurance was upon a ship which had a latent defect, totally unknown to the parties; and it was held, that the insurers were not liable, because the ship was not *sea-worthy*; and that, however innocent and unfortunate the insured might be, yet, if the ship be not sea-worthy at the time of the insuring, there is no contract at all between the parties; because, the very foundation of the contract, *the ship*, was in the same condition as if it did not exist. And the doctrine is the same in insurance upon goods as when it is upon the ship itself. *Parke, 220, 229: 5 Burr. 2802.* And she must be furnished with every thing necessary for the purpose of safe and careful navigation. *7 T. Rep. 160.*

Whenever a case arises with respect to damage done to goods through the insufficiency of the ship, the question, whether the master or owner is liable to make good the loss, depends upon ascertaining, whether the ship was in a condition to perform the voyage at the time of her departure,

ture, or because defective from bad weather, and the perils of the wind and sea. 2 *Val.* 164.

If it can be shewn, that the decay, to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable, though she should even be lost a few days after her departure. 5 *Burr.* 2804. By an implied warranty, every ship insured must be kept staunch and strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after departure, and yet the underwriter will continue liable. *Doug.* 708.

If a ship becomes leaky immediately after sailing, and founders without any visible cause, the jury may presume she was not sea-worthy. *Sitt. at Guild. Mich.* 1794, *Monro and another v. Vandam: Parke*, 221, n.

VIII. *Of illegal voyages.* — Whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of this country, the policy is void. And in such a case it is immaterial whether the underwriter did or did not know that the voyage was illegal; for, the court cannot substantiate a contract in direct contradiction to law. In like manner, if a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *Doug.* 241: *Peake*, 233, 4: 1 *Black. Com.* 270.

An insurance upon a smuggling voyage, prohibited by the revenue-laws of this country, is void; but this country pays no regard to the revenue-laws of another. *Doug.* 238.

The question, how far trading with an enemy in time of actual war and how far insurances upon the goods of an enemy are legal, expedient, or political, has been frequently considered. *Lord Mansfield* has said, that, by the maritime laws, trading with an enemy is cause of confiscation, provided you take him in the fact. But this does not extend to neutral vessels. The common law does not, however,

however, seem directly to forbid such trading, but several statutes have been made to make such trading illegal. As to the insurance of the enemy's property, *Lord Hardwicke* observed, that there had been no determination that such insurances were unlawful; but the *Stat. 33 Geo. III. c. 27*, renders insurances on French property unlawful during the war, and moreover subjects offenders to three months imprisonment. And it has been lately determined in the Court of King's Bench, that no action can be maintained either by or in favour of an alien enemy; and, as a consequence of that determination, it has been decided, that the insurance of an enemy's property is illegal, and no action can be maintained thereon. 1 *Vez.* 317: 1 *T. Rep.* 84: 6 *T. Rep.* 23, 35.

If there be any illegality in the commencement of an integral voyage, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy. 8 *T. Rep.* 31.

IX. *Of prohibited goods.* — All insurances upon commodities, the importation or exportation of which is prohibited by statute or royal proclamation, are void; and the rule prevails in this instance also, whether the underwriter did or did not know that the subject of the insurance was a prohibited commodity. 1 *Black. Com.* 270: *Parke*, 244, 254. Besides which, transactions of this nature are subjected to heavy penalties by several acts of parliament. The breach of a proclamation is a criminal act; and, wherever a man makes an illegal contract, the courts of justice will not lend him their aid to compel a performance. And on this ground is the underwriter, in such cases, discharged from any demand set up against him. *Delmada v. Motteux, B. R. Michaelmas*, 25 *Geo. III.*: *Parke*, 254.

It is clearly settled, that one nation never takes notice of the revenue-laws of another; and, therefore, insurances made upon goods, the exportation or importation of which

are forbidden by the laws of other countries, are good and valid. *Doug.* 238: 1 *Vez.* 319.

X. *Of wager-policies.* — The real nature of a policy is a contract of indemnity from a real and manifest, not from a supposed and ideal, loss. And, therefore, in policies upon "interest or no interest," or "valued free from average," it is clear, that the performance of the voyage, or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance; and such are considered as gambling policies, concerning which the *Stat.* 19 Geo. II. c. 37, enacts, that insurances, made on ships or goods, "interest or no interest," or "without farther proof of interest than the policy," or "by way of gaming or wagering," or "without benefit of salvage to the insurer," are void. The statute, however, contains an exception for insurances on private ships of war, fitted out solely to cruize against his majesty's enemies; and also provides, that any merchandize or effects from any ports or places in Europe or America, in the possession of the crowns of *Spain* or *Portugal*, may be insured as theretofore.

And it has been decided, that the statute does not extend to insurances of foreign property on foreign ships. *Doug.* 301.

A valued policy is not a wager-policy; but, in these cases, the insured must prove some interest, though not the value of it. But, if a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void. 2 *Burr.* 1167: 4 *Burr.* 1966.

An insurance being made on any of the packet-boats that should sail from *Lisbon* to *Falmouth*, or such other port in England as his majesty should direct, for one year, upon any kind of goods and merchandizes whatsoever, it was agreed, that the goods and merchandize should be valued at the sum insured, without farther proof of interest than the policy; the
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court held, that this was a policy of a mixed nature, partly a wager-policy, partly an open one, and that the insured might recover. 4 *Burr.* 1966.

Upon a joint capture by the navy and army, the officers and crews of the ships, before condemnation, have an insurable interest by virtue of the Prize-Act. *Le Cras v. Hughes, B. R. Easter, 22 Geo. III. : Parke, 269.*

So, also, the commissioners for the care and disposal of Dutch effects have an insurable interest in Dutch ships and effects, seized at sea, for the purpose of bringing into the ports of this kingdom. 8 *T. Rep.* 13.

And it has been determined, that the captors of ships seized by them as prize have an insurable interest in them in the voyage home, for the purpose of bringing them to adjudication in the Admiralty; so that, although the Court of Admiralty should ultimately adjudge them not to be prizes, the captors are not entitled to a return of premium. *Id.* 154.

An insurance on the profits expected to arise from a cargo of molasses belonging to the plaintiff was held to be good, although there was a clause declaring that, in case of loss, the profits should be valued at £1000, without any other voucher than the policy. *Grant v. Parkinson, Mich. 22 Geo. III. B. R. : Parke, 267.*

All insurances, made by persons having no interest in the event about which they insure, or without reference to any property on-board, are merely wagers, and are void. *Cowp.* 583.

And, wherever the court can see upon the face of the policy that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such policy void. *Doug.* 451.

And they will not suffer the act to be evaded by a proof of interest, where it turns out that the sum insured is large and the interest small. *Cowp.* 583.

XI. *Of re-assurance.* — Re-assurance is a contract, which the first underwriter enters into in order to relieve himself from those risks, which he had previously undertaken, by throwing them upon other underwriters, who are called re-assurers. *Parke*, 276.

By the 19 Geo. II. c. 37, sect. 4, re-assurances in this country, either by British subjects or foreigners, whether on British or foreign ships, are rendered unlawful, unless the assurer should be *insolvent*, become a *bankrupt*, or *die*. In either of which cases, such assurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance. And the reason of this permission is plain; for, if the assurer become insolvent or bankrupt, his fund is not diminished in case of loss, and the insured has a better security. And, in case of death, it is beneficial to his successors; because it will provide assets to satisfy the insured in case a loss should happen. *Parke*, 278.

And the prohibition of such re-assurances extends to foreign ships, previously insured by foreign underwriters. *2 T. Rep.* 161.

Where a policy is void as a re-assurance, the premium is not recoverable. *Doug.* 251.

In *France*, as in other countries, it was formerly allowed to the insured to insure the solvency of the underwriter; but this practice is not allowed in *England*; and, although no express notice is taken of it in the above statute, it seems that such a policy would be deemed a wager-policy, and treated accordingly. *Parke*, 280.

XII. *Of double insurances.* — Re-assurances and double assurances have been confounded together, but they are widely different. We have already described a re-assurance. A *double assurance* is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made

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two insurances upon the same goods or the same ship. Re-assurances are made by the insurer, double insurances by the insured. 1 *Burr.* 496: *Parke*, 280.

A double insurance is not void; but the insured shall recover only one satisfaction for his loss. And various persons may insure various interests on the same thing, and each to the value; (as the master for wages, the owner for freight; one person for goods, another for bottomry;) and such a contract does not fall within the idea of a double insurance. 1 *Burr.* 496. The insured may go against which set of underwriters he pleases; and, when one set of underwriters pay the loss, they may call on the other underwriters to contribute in proportion to the sums they have insured. 1 *Black. Rep.* 103, 416.

XIII. *Of a return of premium.* — Captors of ships seized as prize, who have insured their interest therein, are not entitled to a return of premium, although it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the Court of Admiralty. 8 *T. Rep.* 154.

It is a question not decided, whether, in cases of fraudulent insurance, where the underwriter has run no risk, he shall be liable to return the premium. In some equitable cases, where the underwriters have been relieved on account of fraud, it has been decreed that the premium should be returned. And it has been laid down as clear law, that, if the underwriter has been guilty of fraud, an action lies against him to recover the premium. On the other hand, if the fraud be on the part of the insured, and is notoriously palpable and gross in its nature, the Court of King's Bench will order the underwriter to retain the premium. 2 *Valin*, 96: 2 *Vern.* 206: 2 *P. Wms.* 170: 3 *Burr.* 1361.

By the *Stat.* 28 Geo. III. c. 38, sect. 47, to prevent insurance of exported wool, if the underwriter informs against the party insuring, he may retain the premium; but,

but, if the insured inform, he may recover it back. When a policy is void as a wager-policy, under 19 Geo. II. c. 37, though the ship arrived safe, the underwriter may retain the premium. *Doug.* 454. And so he may in the case of a re-assurance, void by the same statute. 3 *T. Rep.* 266.

In general, when the property has been insured to a larger amount than the real value, the overplus premium, or if goods are insured to come in certain ships from abroad, but are not in fact shipped, the whole premium, shall be returned. If the ship be arrived before the policy is made, the insurer being apprized of it and the insured being ignorant of it, he is entitled to have the premium restored on the ground of fraud. But, if both parties are ignorant of the arrival, and the policy be "lost or not lost," it seems the underwriter ought to retain it; as, if the ship had been lost at the time of underwriting, he would have been liable to pay the amount of his subscription. 1 *Mag.* 90: *Doug.* 255: 1 *Vesey*, 319.

Clauses are frequently inserted in the policy, that, on certain events, there shall be a return of premium. *Doug.* 255.

In short; if the ship or property insured was never brought within the terms of the contract, so that the insurer never run any risk, the premium must be returned. 3 *Burr.* 1240: *Cowp.* 668: 1 *Show.* 156.

Two rules are solemnly established: 1. That, whether the cause of the risk not being run is attributable to the fault, will, or pleasure, of the insured, or to any other cause, the premium is to be returned. *Cowp.* 668.

And, 2, where the contract is entire, whether for a specified time or for a voyage, and the risk is once commenced, and there is no contingency on which the risk is to end, at any intermediate period, nor any usage to the contrary established on such voyages, there shall be no apportionment or return of premium afterwards. Hence, in cases

cases of deviation, though the underwriter is discharged, he shall retain the premium. So, in cases of insurance for twelve months, where the loss happens in two; even though the premium is calculated at so much per month. Likewise, where different ports are mentioned in the course of an outward and homeward bound voyage, and the ship is lost before setting out on her return: in all these cases, also, the premium shall be retained. *Cowp.* 666: *Doug.* 564, 751: *Parke*, 389, 390.

But it is otherwise if the jury find an express usage upon the subject of return of premium. *Long v. Allen, B. R. East.* 25 Geo. III.: *Parke*, 390. And, indeed, it seems so many difficulties occur in apportioning the premium, that the courts often decide against it, unless there be something like a usage found to direct the judgement of the court. *Parke*, 392. But, if there are two distinct points of time, or, in effect, two voyages, either in the contemplation of the parties, or by the usage of the trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy. 1 *Black. Rep.* 318.

The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived;" and it was held, that the insured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and re-captured, and the insured had been obliged to pay for salvage. 7 *T. Rep.* 421.

XIV. *Of changing the ship.* — It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy, it follows, as an implied condition, that the insured shall neither substitute another ship before the voyage commences, (in which case there would be no contract at all,) nor, during the voyage, remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable

voidable necessity ; in order to ascertain which, every thing possible must be done for the benefit of all concerned. If, in violation of this principle, the ship be changed, the implied condition is broken, and the owner cannot, in case of loss, recover against the underwriter. 2 *Str.* 1148.

XV. *Of deviation.* — Deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. *Parke*, 294.

Whenever this happens, the voyage is determined, whether the policy be on ship or freight, and the insurers are discharged from any responsibility. The reason of which is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify. *Roccus Not.* 52: *Doug.* 278.

And it is immaterial, in this case, whether the loss be or be not an actual consequence of the deviation ; for, the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Nor does it make any difference, whether the insured was or was not consenting to the deviation. *Ibid.* : *Parke*, 295. If, therefore, the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation. And, if a deviation be for a single night, or for an hour, it is fatal. 7 *Bro. Parl. Cas.* 459.

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage or some special facts be proved to vary the general rule. 6 *T. Rep.* 531. But, if a merchant-ship carry letters of marque, she may chase an enemy, though she may not cruise without being guilty of a deviation. *Parke*, 298, 299 : 6 *T. Rep.* 379.

It has also been held that, even where there is permission given to touch and stay at a place, that confers no privilege on the assured to break bulk, or to unload any part of the cargo ;

cargo; and breaking bulk will avoid the policy. *Stitt v. Wardell, Sitt. after M. 1797: Parke, 295.*

If the assured, without knowledge of the underwriter, take out a letter of marque (but without a certificate, which, by the Prize-Act, 33 Geo. III. c. 66, is absolutely necessary to its validity) for the purpose of inducing seamen to enter, without any intention of cruising, this does not avoid the policy. 6 *T. Rep.* 379.

Wherever the deviation is occasioned by absolute necessity, as where the crew force the captain to deviate, the underwriters continue liable. The general justifications for a deviation are, to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek for convoy. 1 *Atk.* 505: 1 *T. Rep.* 22: *Parke, 299.*

If, therefore, a ship is decayed, or hurt by a storm, and goes to the nearest port to refit, it is no deviation, because it is for the general interest of all concerned. So, whenever a ship, in order to escape a storm, goes out of the direct course, or, in the due course of the voyage, is driven out of it by stress of weather, this is no deviation. And, if a storm drives a ship out of the course of her voyage, and she does the best she can to get to the port of her destination, she is not obliged to return to the point from which she was driven. 1 *T. Rep.* 22: *Parke, 300, 3.*

A deviation may also be justified if done to avoid an enemy, or seek for convoy at the place of rendezvous; because it is, in truth, no deviation to go out of the course of a voyage in order to avoid a danger, or to obtain a protection against it: if, in all cases, the master of the ship acted fairly and in good faith, according to the best of his judgement. 2 *Salk.* 445: 2 *Str.* 1265: *Cowp.* 601.

Where a captain justifies a deviation by the usage of a particular trade, there must be a clear and established usage, not a few vague instances only. *Parke, 309.*

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In all cases of deviation, it may be laid down as a general rule, that, wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and, in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequence, of the act, as the true ground of judgment. But, to avoid as much as possible any additional risk, in case of a deviation from necessity, the ship must pursue such voyage of necessity, in the direct course, and in the shortest time possible, as nothing more must be done than the necessity requires, otherwise the underwriters will be discharged. *Doug.* 271.

If a ship be insured upon a trading voyage, it is incumbent on the parties assured to carry on that trade with usual and reasonable expedition; otherwise their conduct will amount to a deviation, and discharge the policy. *Hartley v. Buggin*, B. R. *Mich.* 22 Geo. III.: *Parke*, 313.

If the voyage described be from "A. to B. and C." and the ship goes to C. before B. (C. being nearer to A. than B. is,) it is a deviation, if it be not the regular and settled course of the voyage to go to C. first. 6 *T. Rep.* 531. But, Q. whether such a regular and settled course would control a policy so worded? *Ibid.*

When a ship is insured from one port to another, the policy does not attach, unless she *SAIL on the voyage insured*, though she may afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. 2 *T. Rep.* 30.

If there be any unnecessary delay in landing, it may possibly amount to something in the nature of a deviation, so as to discharge the insurer. *Per Lord Kenyon*, see *Parke*, 314.

A deviation merely intended, but never carried into execution, does not discharge the insurers; and whatever loss happens

happens before actual deviation, or the dividing-point of the voyage, falls upon the underwriters. But, if it can be shewn that the parties never intended to sail upon the voyage insured, if all the ship's papers be made out for a different place from that described in the policy, the insurer is discharged, though the loss should happen before the dividing-point of the two voyages. And, in all cases, deviation or not is a question of fact to be decided, subject to the above rules, according to the circumstances of the case. 2 *Sir.* 1249: *Doug.* 346: 2 *T. Rep.* 30: 7 *T. Rep.* 162.

In cases of deviation, the premium is not to be returned; because, the risk being commenced, the underwriter is entitled to retain it. *Cowp.* 668: *Parke*, 377.

XVI. *Of warranties, and non-compliance with them.* — A warranty in a policy of insurance is a condition or a contingency that a certain thing shall be done or happen; and, unless that be performed, there is no valid contract. And it is perfectly immaterial with what view, if any, the warranty is inserted in the contract; but, being inserted, it becomes a binding condition on the insured, and he must shew a literal compliance with it. So, on the other hand, they shall be strictly construed in favour of the insured. As, where a ship is warranted well on any certain day, though she be lost by eight in the morning of the day, when the policy was effected at noon, the underwriter shall be liable. And it was held, that the warranty was sufficiently complied with, if she were well any time that day. 1 *T. Rep.* 345: 3 *T. Rep.* 360.

It is not material whether the loss happened in consequence of the breach of warranty or not; for, the very meaning of inserting a warranty is to preclude all inquiry about its materiality; and it is also immaterial to what cause the non-compliance is to be attributed; for, although it might be owing to the merest accident, or to the most
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wise and prudential reasons, the policy is avoided. 3 *T. Rep.* 360: *Cowp.* 607.

In this strict and literal compliance with the terms of a warranty consists the difference between a *warranty* and a *representation*; the latter of which need only be performed in substance. *Cowp.* 787.

In a *warranty*, the person making it takes the risk of its truth or falsehood on himself; in a *representation*, if the insured asserts that to be true, which he either knows to be false, or about which he knows nothing, the policy is void, on account of fraud; but a representation made without fraud, if not false in a material point, does not vitiate the policy. *Ibid.*

In order to make written instructions binding as a warranty, they must appear on the face, and make a part, of the policy; for, though a written paper be wrapped up in the policy, and shewn to the underwriters at the time of subscribing, or even if it be wafered to the policy, it is not a warranty but a representation. *Cowp.* 790: *Doug.* 82. But a warranty written in the margin of the policy is considered to be equally binding, and liable to the same strict construction, as if written in the body of the policy. *Doug.* 10, 12, 271. And, if the policy refer to certain printed proposals, the proposals will be considered as part of the policy. 6 *T. Rep.* 710.

If the underwriter pays the loss on a policy, and afterwards finds that such warranty was not strictly complied with, he may recover back the money again by action. 1 *T. Rep.* 343.

Warranties are in their kinds so various, that they cannot well be enumerated, especially as each depends on the peculiar circumstances of the case. The three cases of warranty, on which most questions have arisen, are, as to the, 1, time of sailing; 2, convoy; and, 3, neutrality of property. And it may be observed, that those rules, which
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are applicable to warranty in general, are applicable to each of these individually. *Parke*, 325.

1. *As to the time of sailing.* — If a man warrant to fail on a particular day, and breaks it, the underwriter is no longer liable. And a detention by government, previous to the purposed day of sailing, is no excuse for not complying with the warranty, nor a peril within the terms of the policy. *Cowp.* 784.

So, if the warranty be to fail after a specific day, and the ship fails before, the policy is void. *Vezian v. Grant, Guild. East. Vac. 1779: Parke*, 326.

But, when a ship leaves her port of lading, having her full and complete cargo and clearances on-board, and having no other view but the safest mode of sailing to her port of delivery, for which purpose she touches at any particular place of rendezvous for convoy, &c. her voyage must be said to commence from her departure from the port of loading; and, though she be detained at such place of rendezvous by an embargo, she has complied with the warranty. *Cowp.* 601, 608: *Doug.* 346.

2. *As to warranty of sailing with convoy.* — If the insured warrant that the vessel shall depart with convoy, and it do not, the policy is defeated, and the underwriter is not responsible. A convoy means a naval force, under the command of a person appointed by government or its agents.

On this subject the *rules* of law clearly are, that a warranty to depart with convoy must be construed according to the usage among merchants, and implies that the ship shall go with convoy from the usual place of rendezvous, at which the ships have been accustomed to assemble; as, at *Spithead*, or the *Downs*, for the port of *London*; and *Bluefields* for all the ports of *Jamaica*. *Parke*, 339: 2 *Str.* 1265.

That the ship is protected by the policy from the particular port from which it sails to such usual place of convoy.

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That,

That, although the words generally used in the policy are "to depart with convoy," or "to sail with convoy," yet they extend to sailing with convoy throughout the whole of the voyage. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty, and the insurer is discharged from his engagements. *Salk.* 443: 3 *Leo.* 320: *Doug.* 72.

That, notwithstanding a ship must depart with convoy for the whole of the voyage, yet an unforeseen separation is an accident to which the underwriter is liable; so that no fraud or neglect be found in the master after his departure. The construction of the policy being that the insured ship shall keep company with the convoy during the whole voyage if possible. *Doug.* 73: *Carth.* 216: 2 *Str.* 1250.

That, where the ship, by tempestuous weather, is prevented from joining the convoy at all, at least of receiving the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy, within the terms of the warranty. *Ibid.*

That, if there be an opportunity of convoy, if the convoy throw out repeated signals, notwithstanding which, the ship insured should neglect to sail, and so lose the opportunity, the warranty is not complied with, though she sail but a short time afterwards; and, if she be taken in consequence thereof, the underwriter is discharged. *Parke,* 349.

That, although a ship must not voluntarily depart from convoy during the voyage, yet this species of warranty must always be construed with an eye to the usage of trade and to the orders of government. For, if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy for the trade of a place to a given latitude and no farther, and there be no other convoy on that station; a ship, taking the advantage of such a
convoy,

convoy, has complied with the warranty to sail with convoy for the voyage. *Parke*, 349.

If a ship do not sail with the convoy appointed by government, it is not a sailing with convoy; for, it is one thing to be under convoy of a king's ship, and another to sail under its protection. 1 *Emerigon*, 171: *Parke*, 339.

That a convoy, appointed by the admiral commanding in chief upon a foreign station, is a convoy appointed by government; and, if the ship do not sail with convoy, it matters not whether the loss do or do not happen on account of the breach of the warranty, for the policy is forfeited, though the ship insured should perish in a storm after she has joined the regular convoy. *Hibbert v. Pigou*, B. R. *East*. 23 Geo. III.: *Parke*, 339.

The cases decided on the first of these rules are *Letheulier's case*, 2 *Salk.* 443; and *Gordon v. Morley*, 2 *Str.* 1265; where it appeared, that a convoy for a particular trade was appointed at Spithead, and the ship in question, having tried for a convoy in the Downs, proceeded to Spithead, and was taken in her way thither. This case applies also to the second of the above rules. And it was then observed, that, if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the Downs. See also a similar case in *Emerigon*, 1 tom. 166: *Parke*, 343.

It does not appear to be decided whether sailing-orders are necessary, but it seems to be the prevailing opinion, that, unless sailing-instructions* are obtained, the warranty is not complied with. *Bos. and Pul.* 5: *Parke*, 342.

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* Since the above remark was made, the case of *Anderson v. Pitcher* has been before the court, the particulars of which are as follow:

This cause was tried before Lord Eldon and a special jury, at the sittings in London, after last Hilary Term; when, under the direction of that learned judge, a verdict passed in favour of the plaintiff, an underwriter, to recover from

It is an extraordinary circumstance, that, among all the numerous questions which have been agitated concerning insurances,

from the defendant, the insured, a loss of £ 300, paid by the plaintiff to the defendant's agent in January, 1796, on a ship called the Golden Grove; which ship was lost on the 18th of November, 1795. *She was warranted by the policy to depart from the place of rendezvous with convoy.*

The point upon which the plaintiff obtained such verdict, and which first occurred to the learned judge at the trial, was this: " That, although the " Golden Grove joined the convoy at the place of rendezvous before the convoy " bore away or departed therefrom, to wit, about four P. M. on the 15th of " November, 1795, and did in fact depart with it, and under its control and " protection, and did afterwards obtain the convoy's instructions, viz. on the " morning of the following day; yet that, not having the instructions on- " board before the convoy set out from the rendezvous, it was not a departure " with convoy;" in consequence of which, the underwriter had a right to recover back the loss paid by him to the defendant's agent, as above-men- tioned.

It appeared, by the evidence on the part of the defendant, that, after the greater part of the fleet, with the Golden Grove in the midst of them, had commenced their departure, the Rodney, and about twenty other vessels, were brought up by a couple of frigates, and received their sailing-instructions at sea; and, by the admiral's return, it appeared, that several ships received their instructions on, and even subsequent to, the 16th, when the Golden Grove received her's, and were included in that return as part of the convoy.

The defendant also produced evidence to shew, that the captain of the Golden Grove, who was waiting at Portsmouth for his ship to come from the Downs, had been applying for the instructions on the evening of the 14th, or morning of the 15th, of November, which application was unsuccessful, because his ship was not then arrived in company; and it never is customary to give instructions, unless the ship applying for them is within the company of the convoy. And, by the testimony of Commissioner Schank, it appeared, that afterwards, when she became entitled to the instructions, the captain used great vigilance, and even left provisions and other things on the beach, that he might not lose a moment in getting the instructions that day if possible. The convoy sailed, as above stated, about four o'clock in the afternoon of the 15th of November: at half-past four in that season of the year the sun sets, so that it must have been soon dark. The instructions were obtained early the next day. The loss happened by tempest on the 18th, and was totally unconnected with the objection raised. *The plaintiff offered no evidence whatever to impeach the captain of neglect.*

Under

insurances, it appears to remain a point to the present moment unsettled, what shall be deemed the port of *London*, in insurances “*at and from London*, warranted to depart on “or before such a day.” It is said, on one hand, that, the moment a ship is cleared out at the Custom-house, and has all her cargo on-board, if she quit her moorings in the river on or before the day warranted, the warranty is complied with: and, on the other hand, that a ship is not ready for sea till she has her Custom-house cocket on-board, which is the final clearance, and which she cannot have till she arrive at *Gravesend*. That, till this cocket is received, the ship dare not proceed to sea under a penalty; and, till then, is not entitled to the drawbacks; and, finally, that *Gravesend* is always considered as the limits of the port of *London*.

3. *Of warranty of neutrality.* — This warranty differs from the two former; for, if the warranty be not complied with, the contract is not merely avoided as for a

Under these circumstances, the defendant conceived it ought to have been inferred, that the captain did every thing in his power towards getting the instructions at the earliest moment; or at least that it ought to have been left to the jury to say whether he could and ought to have got the instructions sooner than he did; and he therefore applied, in the course of the present term, to the court for a new trial to be granted; but the application was refused, after considerable argument.

The defendant produced, for the consideration of the court, affidavits sworn by commanders of convoys, admirals secretaries, &c. to prove the existence of a custom of trade, by which sailing-instructions are delivered after sailing from the rendezvous, as well as before, to such ships as have not had a convenient opportunity of getting them before departure; but the court thought such a custom ought not to be supported.

The inference from this decision is, that ships so warranted ought not to depart from the place of rendezvous without the sailing-instructions on board; and that, where that is impracticable, (unless through the act of the convoy,) they ought to cast anchor, and remain there till another convoy is appointed. And thus has this point, which so long remained doubtful, been at length decided. *East. 40 Geo. III. C. B.*

breach, but it is absolutely void from the beginning as a fraud. 4 *Burr.* 1419: 1 *Black. Rep.* 427.

If the ship, &c. is neutral at the time the risk commences, the insurer takes upon himself the chance of war and peace during the continuance of the policy. *Doug.* 705: 1 *T. Rep.* 477: *Doug.* 554.

The sentence of a Court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it; and, therefore, if it appear evident, without a possibility of doubt or ambiguity, that the sentence proceeded upon the ground of the property not being neutral, this is conclusive evidence against the insured that he has not complied with his warranty, and consequently the underwriter is no longer responsible. *Barzillay v. Lewis, B. R. Trin. 22 Geo. III.: Parke, 359, 360.*

It has also been determined, that, where no special ground at all is stated, but the ship is condemned generally as good and lawful prize, the court here must consider it as conclusive evidence that the property was not neutral, and will not again open the proceedings of the court abroad in favour of the party who has warranted his property to be neutral. *Salucci v. Woodmass, B. R. Hil. 24 Geo. III.: Parke, 361.*

If the ground of decision appear to be not on the want of neutrality, but upon a foreign ordinance manifestly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty so as to discharge the insurer. *Mayne v. Walter, B. R. East. 22 Geo. III.: Parke, 362.* And so in another case it has since been determined, that a warranty of neutrality is not falsified by a sentence of a foreign Court of Admiralty, condemning a ship for navigating contrary to the ordinances of the belligerent state, to which the

the neutral country had not assented. 8 *T. Rep.* 434. See NATIONS, LAW OF.

And, though the vessel be condemned as a prize, yet, if the grounds of the sentence appear manifestly to contradict such a conclusion, the court here will not discharge the underwriters, by declaring that the insured has forfeited his neutrality. *Saloucci v. Johnson*, B. R. Hil. 25 Geo. III.: *Parke*, 363.

If a foreign Court of Admiralty condemn a ship, warranted *American*, as enemy's property, for not having on-board a *rôle d'équipage*, or list of the crew, which is required by a French ordinance, and which the Court of Admiralty adjudged to be requisite, within the meaning and construction of the treaty between France and America, the adjudication in France is conclusive against the warranty that she was an American ship, though in fact she was so; that point being clearly within the jurisdiction of the foreign court. 7 *T. Rep.* 681.

Even when there has been no sentence of condemnation, if a ship is warranted *American*, and sails without such a passport, the warranty is not complied with. *Id.* 705.

But, where there is no warranty of being *American*, a sentence, adjudging a ship to be a good prize, as belonging to the enemies of the Republic, negatives no fact which it was incumbent on the assured to prove; for, a sentence of a foreign Court of Admiralty is only conclusive here in an action on a policy of assurance, as to the express ground of the sentence, but not as to any of the premises (noticed in the consideration-part of the sentence) that led to the adjudication. 8 *T. Rep.* 192.

Any forfeiture of neutrality by the wilful act of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty. 8 *T. Rep.* 230.

A sentence of condemnation of a *British* ship, (which had been captured by a French privateer, and carried into *Bergen*, in *Norway*,) by the French consul at *Bergen*, is an illegal sentence. And if, after such an illegal sentence, the owner should re-purchase the ship at a public auction at *Bergen*, he cannot recover the money so paid from the owner to the underwriters. Such a contract is a ransom, and illegal by the *Stat. 2 Geo. III. c. 25*, and *35 Geo. III. c. 66, sect. 37: 8 T. Rep. 268*.

XVII. *Of proceedings on policies.* — The action against the insurance-companies must be debt or covenant, as their policies are under seal: and, to recover against a private underwriter, the form of action is a special *indebitatus assumpsit*; which action may be brought by the broker effecting the policy. And, by *Stat. 19 Geo. II. c. 37, sect. 6*, within fifteen days after action brought, the plaintiff, on request in writing, must declare the amount of all insurances on the same ship. This statute also enables defendants to pay money into court in all such actions; after which, if the plaintiff proceeds, and has not a verdict for more than the money paid, he shall pay costs to the defendant.

When money has been paid by mistake to the insured, or where the insured wishes to recover back the premium, the proper remedy is by action for money had and received for the plaintiff's use.

Sentences of foreign Courts of Admiralty are frequently brought forward in assurance-causes. It may, therefore, be proper to remark, that, wherever the ground of such sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties, or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding. But, if the sentence be so ambiguous and doubtful that it is difficult to say on what ground the decision turned; or if there be
colour

colour to suppose that the court abroad have proceeded upon matter not relevant to the matter in issue; there, evidence will be allowed in order to explain; and, if the sentence upon the face of it be manifestly against law and justice, or be contradictory, the insured shall not be deprived of his indemnity; because, any detention by condemnation under particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance. 7 *T. Rep.* 523, 681, 705: 8 *T. Rep.* 192, 230.

And, in a late case on a policy from *Charlestown* to *London*, and warranted *American* property, the ship was captured and carried into *Nantes*, and there condemned, the court held, that, where there is a sentence of a foreign court of competent jurisdiction, the courts of law in England are bound to give credit to it, from the *comitas inter gentes*; but, if a foreign court proceeds on grounds contrary to the law of nations, their judgement ought not to have any weight to control the courts here. See 7 *T. Rep.* 523.

A new trial will not be granted to give the defendant an opportunity of proving the illegality of a policy, which was not illegal on the face of it; for, he should have shewn it on the trial.

An insurance made in a foreign country may be sued here by common law, if the assurers come here. *Molloy*, 295.

There are cases, where an application to a court of equity on the part of the insured is proper; as, if a trustee in a policy do actually refuse his name to the person for whom he is trustee in an action of law. So, where there is a suspicion of fraud. 2 *P. Wms*, 170. Or if the persons, whose testimony is requisite, reside abroad, a commission from the Court of Chancery to examine those witnesses may be necessary. 1 *Aik.* 547: 2 *Aik.* 359.
And

And in this last case it may be necessary to apply to a court of equity for an injunction to stay proceedings at law. 2 *Atk.* 359. Except in these instances, all issues upon policies of insurance must be tried in the courts of common law. Even if the parties, by a clause in the policy, agree that, in case of dispute, it shall be referred to arbitration, that will not bar an action at law, if no reference has been in fact made nor is depending. 1 *Wils.* 129.

It does not seem to be clearly ascertained whether a nation at war has a right to search neutral ships. *Parke*, 364: 8 *T. Rep.* 230: See *Dr. Robinson's "Report of the "Judgement, &c. on the Swedish Convoy,"* which contains the judgement of Sir William Scott in the case of the *Maria, Paulsen*, master, in favour of that right.

Duties imposed on marine insurances. — By the *Stat.* 35 *Geo. III.* c. 63, on every sheet, &c. on which any insurance upon any ship, goods, or merchandize, shall be engrossed, where the amount insured is £100, there shall be a stamp-duty of 2s. 6d.; and so progressively for every £100 insured. And, where the sum insured shall not amount to £100, a like duty of 2s. 6d. And, where the sum to be insured shall exceed £100, or any progressive sums of £100 each, by any fractional part of £100, a like duty of 2s. 6d. for each fractional part of £100. And, upon every insurance, where the premium shall not exceed the rate of 10s. there shall be paid, where the sum insured amounts to £100, a duty of 1s. 3d.; and so progressively for every £100 so insured. And, where the sum so to be insured shall not amount to £100, a like duty of 1s. 3d. And, where any sum to be so insured shall exceed £100, or any progressive sums of £100 each, by any fractional part of £100, a like duty of 1s. 3d. for such fractional part of £100. Which duties shall be paid by the assured. And, by sect. 4, upon all insurances, where the premium actually given shall not exceed the rate of 10s. per centum on the
sum

sum insured, in all cases where the sum insured shall amount to £200 or upwards, stamps of 2s. 6d. for every £200 may be used, instead of those of 1s. 3d. for every £100. — *Note.* This does not extend to any insurance of houses, furniture, goods, wares, merchandizes, or other property, from fire, already subject to duty; nor to any insurances on lives.

By the same statute, the *premium, risk*, names of subscribers and underwriters, and sums insured, shall be inserted, or the insurance shall be void. *Seçt.* 11. And, by *seçt.* 12, no policy shall be made for any certain time longer than a twelvemonth. *Seçt.* 10 empowers the commissioners to make allowances under certain circumstances, where the sums insured on homeward voyages exceed the interest of the assured.

Seçt. 13 allows the making any alterations in the terms of the policy duly stamped after underwritten, so that the alteration be made before notice of the determining of the risk originally insured, and the premium originally paid shall exceed the rate of 10s. per cent. on the sum insured, and so that the thing insured remains the property of the same person, and so that such alteration shall not prolong the term insured beyond the period allowed by the act, and so that no farther sum be insured.

And *seçt.* 15 and 16 impose a penalty of £500, both on the persons procuring, and the brokers effecting, insurances on policies not duly stamped. And the latter can neither demand brokerage nor the money paid for premiums.

And, lastly, by *seçt.* 17, every underwriter subscribing such policy shall forfeit a like penalty of £500.

INTEREST. — See *Usury*.

Interest of money differs in different countries. In England, the rate of legal interest is £5 per cent. per ann.;
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in Ireland, £6; in France, £7; in Italy, £3; Holland, £3; Sweden, £6; in the East Indies, £9. *Burr.* 1096.

When interest is low, trade increases; inasmuch as the lowness of interest induces monied men to place out their money in trade, where they can make a greater profit of it.

The price of land in this country is in a great measure regulated by the price of the public stocks. When they are high, money laid out there bears less interest; when they are low, higher interest. And thus is the price of land enhanced or lessened. When the price of stock is low, and the interest of course high, there are but few buyers of land, and the price is consequently low; but, when the price of stock is high, and the interest therefore low, land finds many customers, and the price is of course enlarged.

Interest is due on all liquidated sums from the instant the principal becomes due and payable; therefore, on all bills of exchange, notes of hand payable at a day certain, accounts stated, or money lent, the jury in assessing damages may give interest. 2 *Black. Rep.* 761: 3 *Wilf.* 205. And, in this respect, money paid, laid out, and expended, for the use of another, stands precisely on the same ground as money lent, in point of reason, justice, and equity. 1 *H. Black.* 305.

But, for goods sold and delivered, or work and labour done, the sum is not liquidated till the jury find the value; and, therefore, in assessing damages in these cases they cannot allow interest. 1 *H. Black.* 305: 3 *Wilf.* 605: 2 *Black. Rep.* 761.

It has been held that, although, by the common law, book-debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade, or of a special agreement; or in cases of long delay under vexatious and oppressive circumstances, if a jury, in their

their discretion, shall think fit to allow it in damages.

1 *Doug.* 375.

And it is the present practice for juries to give interest up to the time of giving judgement. 2 *Burr.* 1077.

Where the principal has been paid on a bond, the obligee cannot recover the interest in an action of debt on the bond. 1 *Esplin. Rep.* 110.

The rate of interest originally reserved on mortgages may be altered at any time by parole agreement, without writing. *Pow. Mort.* 417.

If a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country where the contract was made. 1 *P. Wms.* 395.

If a legacy be left to a man of full age, the executors shall answer interest after the year from the testator's death from the time the legacy is demanded; because it is a deposit in the hands of the executors for the benefit of the legatee, and that deposit must be answered on demand. But, if it be a legacy to an infant, it shall be answered with interest from one year after the death of the testator, because the executor is considered as a trustee, who ought to act for the benefit of the infant, and who ought to put out the legacy, under the decree of the court. 1 *Harr. Chan. Pr. Introd.* 43.

And, in the case of a vested legacy, due immediately and charged on land, or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death. 2 *Black. Com.* 514.

The computation must be by calendar, and not by lunar, months; because, by the latter, the interest would exceed the rate allowed by the statute. *Noy*, 37 : 1 *Leon.* 96.

A COMPENDIOUS

TABLE OF INTEREST,

Shewing the Interest of any Sum, from a Million to a Pound,
for any Number of Days, at any Rate of Interest.

	£.	s.	d.	f.	100 parts		£.	s.	d.	f.	100 parts
1000000	2739	14	6	0	99	900	2	9	3	3	12
900000	2465	15	0	3	29	800	2	3	10	0	11
800000	2191	15	7	1	59	700	1	18	4	1	10
700000	1917	16	1	3	89	600	1	12	10	2	8
600000	1643	16	8	2	19	500	1	7	4	3	7
500000	1369	17	3	0	49	400	1	1	11	0	5
400000	1095	17	9	2	79	300	0	16	5	1	4
300000	821	18	4	1	9	200	0	10	11	2	3
200000	547	18	10	3	40	100	0	5	5	3	1
100000	273	19	5	1	70	90	0	4	11	0	71
90000	246	11	6	0	32	80	0	4	4	2	41
80000	219	3	6	0	96	70	0	3	10	0	11
70000	191	15	7	1	59	60	0	3	3	1	81
60000	164	7	8	0	22	50	0	2	8	3	51
50000	136	19	8	2	85	40	0	2	2	1	21
40000	109	11	9	1	48	30	0	1	7	2	90
30000	82	3	10	0	11	20	0	1	1	0	60
20000	54	15	10	2	74	10	0	0	6	2	30
10000	27	7	11	1	37	9	0	0	5	3	67
9000	24	13	1	3	23	8	0	0	5	1	4
8000	21	18	4	1	10	7	0	0	4	2	41
7000	19	3	6	2	96	6	0	0	3	3	78
6000	16	8	9	0	82	5	0	0	3	1	15
5000	13	13	11	2	68	4	0	0	2	2	52
4000	10	19	2	0	55	3	0	0	1	3	89
3000	8	4	4	2	41	2	0	0	1	1	26
2000	5	9	7	0	27	1	0	0	0	2	63
1000	2	14	9	2	14						

THE RULE. — Multiply the sum by the number of days, and the product by the rate of interest; then separate the two last figures to the right hand, and the rest you will find in the table.

EXAMPLE. — What is the interest of £271 for 90 days, at 7 per cent. per ann.

Multiply £271, the sum,
By 90, the time;

Then multiply 24390
By 7, the rate;

1707130

Then in the table against { 1000 you will find £ 2 14 9 2 14
700 1 18 4 1 10
7 0 0 4 2 41

The Answer is £4 13 6 1 65

IN-

INVENTORY.

Stamp-duty for inventory or catalogue of furniture with reference to any agreement, 5*s*.

INVOLUNTARY INJURY. — See *Accident, Mistake*.

JOINT TENANT.

A joint tenant may make a lease to commence after his death. *Co. Litt.* 88, 9. And a lease for life by one joint tenant is a severance. *Id.* 191, 2.

A surviving joint tenant will not be compelled in equity to perform the agreement of his co-joint tenant deceased, unless the agreement amount to a partition. 1 *Pow. Contr.* 129.

The confirmation of one joint tenant is the confirmation of both. *Co. Lit.* 297.

A joint tenant may release but cannot enfeoff his companion: tenants in common may enfeoff but cannot release: copartners may do either. *Id.* 200.

A surrender of a moiety to the use of a will, and a will made, is a severance. *Id.* 59.

If two or more joint tenants, or tenants in common, be of a house, and the one of them will not repair the house, the other may have a writ *de reparatione facienda*. 2 *L. Raym.* 1090.

But, if two joint tenants are of a wood or close, one cannot compel the other to repair the fences. *Ibid.*

If there are three joint tenants, the alienation of one does not sever the jointure of the other two. *Co. Lit.* 189.

A joint tenant cannot surrender to his fellow. *Noy's Max.* 73: but see *Coke's Compl. Copyholder*, 94, *contra*.

Joint tenants cannot devise by will during the continuance of their estate. 3 *Burr.* 1488.

JOUR-

JOURNEYMEN. — See *Combinations*.

An action will lie for seducing journeymen from their masters, even though they do piece-work. *Cowp.* 55.

By the *Stat.* 39 Geo. III. c. 81, all contracts between journeymen manufacturers or other workmen, or other persons, for obtaining an advance of wages, or for lessening or altering their usual hours or time of working, or for decreasing the quantity of work, or for preventing or hindering any person from employing whomsoever he shall think proper, or for controlling or any way affecting any person carrying on any manufacture, trade, or business, in the conduct or management thereof, shall be illegal and void. And every journeyman concerned in making any such contract, being convicted on his own confession, or on the oath of one witness, within three calendar-months, shall be committed to jail for any time not exceeding three calendar-months, or some house of correction to hard labour for any time not exceeding two calendar-months.

Also, every journeyman, or workman, or other person, who shall enter into any combination for any purpose contrary to the act; or who shall, by giving money, or by persuasion, solicitation, or intimidation, or any other means, directly or indirectly, endeavour to prevent any unemployed journeyman, or workman, or other person, wanting employment in such business, from hiring himself to any manufacturer, or tradesman, or person conducting any business; or who shall, for any purpose contrary to the provisions of the act, by any means whatsoever, directly or indirectly, decoy, persuade, solicit, intimidate, influence, or prevail, or attempt or endeavour to prevail, on any journeyman, or workman, or other person employed in any such business, to leave his work; or who shall hinder or prevent any manufacturer, or tradesman, or other person, from employing in his business such journeymen, workmen, and other persons

persons, as he shall think proper ; or who, being employed, shall refuse to work with any other journeyman or workman employed therein ; and who shall be convicted thereof, upon his own confession, or the oath of one witness, before one justice, within three calendar-months, shall be committed, &c. as before.

And every person whomsoever, (whether employed in any manufacture, trade, or business, or not,) who shall attend any meeting for the purpose of making or entering into any illegal contract, covenant, or agreement, or of entering into, supporting, maintaining, continuing, or carrying on, any illegal combination ; or who shall summons, give notice to, call upon, persuade, entice, solicit, or, by intimidation, or any other means, directly or indirectly, endeavour to induce any journeymen, workmen, or other persons, to attend any such meeting ; or who shall collect, demand, ask, or receive, any sum of money from any such journeyman, workman, or other person, for any of the purposes aforesaid ; or who shall persuade, entice, solicit, or, by intimidation, or any other means, directly or indirectly, endeavour to induce any such person to enter into any combination or to quit his work or employment ; or who shall pay any sum of money, or make or enter into any subscription or contribution for the support or encouragement of any such illegal meeting or combination ; shall, on a like conviction, be subjected to the before-mentioned punishment.

No person (whether employed as a journeyman or workman or not) shall pay any sum or valuable thing as a subscription or contribution for paying any expenses incurred by any person acting contrary to the act ; nor shall, by payment of money or other means, support any journeyman or other person, or contribute towards his support, for the purpose of inducing him to refuse to work or to be hired ; under a penalty of £10. And every journeyman, work-

man, and other person, who shall collect money for the purposes aforesaid, shall forfeit a sum not exceeding £ 5, to be recovered before one justice, and levied by distress; and, if not paid, the offender may be committed, &c. as before.

All subscriptions for the purposes aforesaid are forfeited, half to the king and half to him who shall sue; and the treasurer may be sued for the same as forfeited. And every person liable to be sued for the same shall be obliged to answer on oath to any information in any court of equity by the attorney-general, or at the relation of any informer. But, upon payment into court of the money remaining in the hands of any person at the time of filing the information, and making a discovery of the securities upon which other moneys shall have been placed, the party shall be discharged from the penalty.

And all persons who shall offend against the act shall equally with all other persons be compelled to give evidence upon informations, and shall be indemnified against any prosecution for having offended himself.

Justices may summon offenders; and, on their not appearing, may issue a warrant for their apprehension; and, on their appearing, may determine the matter. Or the justice may in the first instance issue a warrant for their apprehension. And justices may summon witnesses to give evidence; and, if any person so summoned shall not appear, he may be committed to prison till he shall submit to be examined.

Convictions are to be transmitted to the next general or general quarter session to be filed, and if any appeal shall be made therefrom: the justices shall then proceed to hear and determine the matter, but no certiorari is to be granted. The appeal may be made to the next general or general quarter session, and the execution of the judgement of the justice shall be suspended, on the party's entering into a recognizance,

cognizance, with two sureties, to prosecute the appeal and pay costs. But the decision of the sessions is to be final; and, if the judgement be affirmed, the appellant is to pay the penalty, costs, &c.

The act is not to abridge the powers already given to justices touching combinations of manufacturers, &c. nor to empower manufacturers to employ workmen contrary to the provisions now in force for regulating the conduct of any particular manufacture, without license from a justice; which license one justice may grant, whenever the qualified journeymen or workmen usually employed shall refuse to work; or, by misconducting themselves when employed, impede or obstruct the business, or endeavour to injure the persons carrying on the same.

By *Stat. 12 Geo. I. c. 34*, and *22 Geo. II. c. 27*, all contracts of journeymen, employed in any woollen, linen, silk, leather, or iron, &c. manufactures, for raising wages, lessening the hours of work, &c. are illegal, and the offenders shall be sent to the house of correction for three months. The wages, &c. of journeymen tailors are, by *Stat. 8 Geo. III. c. 17*, to be regulated and settled at the quater-sessions in London.

JUDGEMENT. — See *Execution*.

By *29 Car. II. c. 3*, judgements, as against purchasers *bond fide*, for a valuable consideration, of lands, tenements, or hereditaments, to be charged thereby, shall be judgements only from the time they are signed, and not from the first day of term.

If a judgement is entered up against A. and remains unsatisfied, it is understood to be a lien upon any estate he may afterwards purchase.

Judgements, as against executors or administrators, are but simple contracts, unless docketed. *Hickey v. Hayter*, 6 T. Rep. 384. See PRIORITY.

When two judgements are signed on the same day, the priority of one cannot be averred. 1 *T. Rep.* 118.

JURISDICTION.

It is a rule of law, that no suit can be brought in a county-court, unless the defendant resided, and the subject-matter arose, within its jurisdiction; and, where this is not the case, actions may be brought in the superior courts, where the debt is less than 40*s.* *Pul. and Bos.* 75.

The superior courts will, on motion, stay proceedings, where the defendant appears by any means to be beneath the dignity of the court, and that at any time before the trial. Defendant must make affidavit of the fact. 4 *T. Rep.* 495. But the court will not allow a suggestion for double costs, under 23 Geo. II. c. 33, where the original debt, being above 40*s.* has, by a balance of accounts, been reduced below that sum. 1 *Pul. and Bos.* 223.

The proceedings will be stayed, if the defendant will make an affidavit that the debt is under 40*s.*; unless the plaintiff will also make an affidavit to the contrary. 4 *T. Rep.* 495: 5 *T. Rep.* 64.

JURIES.

Lord Hale says that grand jurymen ought to be freeholders; but nothing, he says, has been determined as to the yearly value. 2 *H. H.* 155.

In the courts of Westminster and City of London, jurymen should be householders within the county and city, and have lands, tenements, or personal estates, to the value of £100. 3 Geo. II. c. 25.

And, by 4 Geo. II. c. 7, sect. 3, leaseholders in Middlesex, of the rent or value of £50 a year, over and above ground-rent, or other reservings, shall be liable to serve on juries.

At

At the assizes or sessions in the country, jurors shall have within the county £10 a year, and in Wales £6 a year, above reprises of freehold or copyhold lands or tenements, or of lands or tenements of ancient demesne, or in rents, or in all or any of them, in fee-simple, fee-tail, or for life of themselves or some other person; and, if any of less estate be returned, he may be discharged on challenge or oath. 4 and 5 W. III. c. 24: 3 Geo. II. c. 25.

And, by 3 Geo. II. persons, having an estate in possession in land, in their own right, of £20 a year, above the reserved rent, for 500 years or more, or for 99 years, or any other term, determinable on one or more lives, are liable to serve.

Any person is liable to be on the jury of a court leet, (2 *Haw. P. C.* 69,) whether he be resident within the precincts of the leet or not.

No qualification is necessary for a coroner's jury, except that they are to be of the neighbouring towns. 2 *H. H.* 152.

The jurors ought to come in person and claim their exemption. *Tr. per Pais*, 87.

Sheriff or bailiff, excusing any person for favour or reward, shall forfeit £20 to him who shall sue. 7 and 8 W. III. c. 32.

Jurors in the sheriff's tourn shall have 20s. a year freehold, or 26s. 8d. of copyhold. 1 R. III. c. 4.

Jurors not appearing in a court of record in London, or in any other city or town, corporation, franchise, or liberty, shall, without reasonable excuse on oath, be fined not more than 40s. nor less than 20s. 29 Geo. II. c. 19.

JUSTICES OF THE PEACE. — See *Alcousfes*.

Where any act is required to be done by two justices, it is an established rule, that, if the act be of a judicial na-

ture, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish apprentice. But, where the act is merely *ministerial*, they may act separately, as in the allowance of a poor-rate. Indeed this is the only act of two justices which has yet been construed to be *ministerial*; and the propriety of this construction has been justly questioned, 3 *T. Rep.* 38, 380, 381, 382.

No action can be brought against a justice of the peace for any act done by him in that character, without giving him a month's notice of the *writ* or *process* intended to be sued out, as well as of the *cause of action*, 7 *T. Rep.* 631.

LABOURERS.

All persons fit for labour shall be compelled to serve by the day in the times of hay and corn harvest. And, from the middle of March to the middle of September, labourers are to work from five in the morning to seven or eight at night, being allowed two hours for breakfast and dinner, and half an hour for sleeping the three hot months; and all the rest of the year from twilight to twilight, except an hour and a half for breakfast and dinner, on pain of forfeiting 1 *d.* for every hour absent. See *Stat.* 5 *Eliz.* c. 4.

Labourers conspiring together concerning their work or wages shall forfeit £10 for the first offence, £20 for the second, &c.; and, if not paid, shall be set on the pillory. *Stat.* 2 and 3 *Edw. VI.* c. 15.

Justices of peace and stewards of leets, &c. have power to hear and determine complaints relating to nonpayment of labourers wages. *Stat.* 4 *Edw. IV.* c. 1.

Labourers taking work by the great, and leaving the same unfinished, unless for nonpayment of wages, or where they

they are employed in the king's service, &c. are to suffer one month's imprisonment, and forfeit £5. *Stat. 5 Eliz. c. 4.*

Artificers, labourers, and other persons, absenting themselves from the service of their employers before the expiration of the term contracted for, shall be punished by imprisonment for not less than one month, nor more than three. *Stat. 6 Geo. III. c. 15.*

Justices of the peace may hear and determine disputes, concerning the wages of servants and labourers, not exceeding £10. *Stat. 20 Geo. II. c. 19.* Extended to the tanners in the stannaries, by *Stat. 27 Geo. II. c. 6.* Justices may punish servants on complaint of the masters. *Stat. 20 Geo. II. c. 19, sect. 2.* The *Stat. 20 Geo. II.* shall extend to all servants employed in husbandry, though hired for less than a year. *31 Geo. II. c. 11, sect. 3: 1 L. Raym. 1305.*

LAGAN.

Heavy goods, thrown overboard in times of imminent danger, with a buoy or cork fastened to them, are called *lagan*. While they continue on the sea they belong to the Lord Admiral; but, if they are cast away upon the land, they are then a wreck, and belong to the lord of the manor. *5 Co. Rep. 106.*

LANDLORDS AND TENANTS. — See *Holding over*,
Notice to quit, *Repairs*.

In cases where executions are levied, the landlord is entitled to a year's rent; he must not however distrain, but give notice to the sheriff.

Where a tenant is in possession, and an execution is against the landlord, whose term is to be sold, the sheriff cannot turn the tenant out of possession. *3 T. Rep. 291.*

If a lessor covenant to repair, and do not, the lessee may do so, in preservation of his own estate. And, to an action of debt for rent, he may plead the lessors covenant to repair, and that he laid out the rent in pursuance of the covenant. *Gilb. Act. Debt*, 442. See REPAIRS.

A tenant, holding under a tenant for life, has a right to take the crop he had sown before the death of the tenant for life. And, if a new year was begun before the death of the tenant for life, and no notice had been given to quit, the tenant is entitled to hold the premises for the residue of that year. *Co. Litt.* 55.

An under-tenant cannot discharge himself of the rent due from him to his immediate landlord by a voluntary payment of rent to the superior landlord; but he may do it under the coercion of a threatened distress, and only in that mode.

Where there are several claimants of rent, and the tenant cannot pay to either without danger of being called upon by the other, his remedy is by bill of interpleader in Chancery.

The landlord has a right to enter on the expiration of the term; though, if he do it with a strong hand, to dispossess the tenant by force, he may be indicted. 7 *T. Rep.* 431.

If a tenant, whose lease is expired, is permitted to continue in possession pending a treaty for renewal of his lease, he does not thereby become a yearly tenant, unless rent has been received; but is so strictly a tenant-at-will that he may be turned out of possession without notice. 2 *Esplin. Rep.* 717.

If, at the end of the year, (where there has been a tenancy from year to year,) the landlord accepts another person as tenant, in room of the former tenant, without any surrender in writing, such an acceptance shall be a dispensation of any notice to quit. 2 *Esplin. Rep.* 505. See *Id.* 106, how far *surrender* of a lease should be in writing.

Where

Where a landlord has a right to re-enter for nonpayment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due; nor under the *Stat. 4 Geo. II. c. 28, sect. 2*, if there be a sufficient distress on the premises. 7 *T. Rep.* 117.

LAND-TAX.

Proprietors of land-tax purchased may transfer the same, and the assignment shall be in writing. See the *Schedule of the Act*. A memorial of the assignment must be entered.

A. grants a building-lease to B. who greatly improves the premises; A. is not liable to the land-tax on the improved rent. The landlord is only to pay the old land-tax, and not the additional land-tax, occasioned by the improvement of the estate. 3 *T. Rep.* 377.

LEASES. — See *Annuity, Guardian, Landlord and Tenant.*

It behoves both landlord and tenant to be extremely careful in forming leases. The landlord should guard against assignments to improper persons, and against the bankruptcy and insolvency of the tenant. And the tenant should guard against the consequences of fire and incumbrances. A mere exception of damages by fire does no more than save the tenant from the charges of rebuilding: he cannot under that exception compel the landlord to rebuild; and he must pay his rent, although the premises are prostrate and useless for the whole term. See FIRE.

As it frequently happens that owners of estates grant annual rents out of their estates, and afterwards lease them; whereby the tenant becomes liable not only to pay the rent reserved in his lease, but the rent-charge with which the estate is incumbered, it behoves the tenant to exercise great care on this head; inasmuch as, if the lease be not well made

made in this respect, the tenant may be obliged to pay both rents, and perhaps be left totally destitute of legal remedy against his landlord.

If a lessee makes an under-lease, the landlord cannot sue the sub-lessee for his rent. 1 *H. Black.* 39.

If a lessee for life or years take a new lease of the same thing, this is a surrender in law of the former lease. *Shep. Touch.* 300.

A lease for years, though it be a very long one, cannot be entailed (but may be assigned in trust to several uses which may be an entail in effect). *Pract. Reg.* 400, 401. And leaseholds are reckoned with the personal estate.

A lease, which is voidable, and not absolutely void, must be made void by re-entry, and putting out the lessee, or the landlord may continue and affirm the lease by receiving the rent. *Pract. Reg.* 298.

When the covenant is, that, if the rent be behind for such a time, then the lease to be void; acceptance of rent after failure will not make the lease good. *Dier*, 51.

If there be a variance between the indentures, it shall be taken as the lease is, and not as the counterpart. *Noy's Max.* 57.

The lessee must repair or rebuild damages by fire, tempest, &c. (unless excepted,) when he covenants to leave in repair. *Id.* 16.

Where a man hath the inheritance, the reservation must be to him and his heirs and assigns. 1 *Co. Inst.* 47. But, if the landlord hath only a term, it must be to him, his executors, administrators, and assigns.

A lease for so many years as I shall live is void from the beginning; for, it is neither certain, nor can be reduced to a certainty, during the continuance of the lease. So of a glebe for so many years as he shall continue parson of D. But a lease for years, if I. S. shall so long live, or if he should

should so long continue parson of D. is good. 2 *Black. Com.* 143.

A lease for years may be made to commence *in futuro*, but a lease for life cannot; for, no estate of freehold can commence *in futuro*. Therefore, if I grant lands to *Titius* to hold from Michaelmas next for twenty years, it is good: but, to hold from Michaelmas next for the term of his natural life, it is void. 2 *Black. Com.* 144.

The word *term*, as applied to leases, does not merely signify the *time* specified in the lease, but the *estate* also and interest that passes by that lease; and, therefore, the *term* may expire during the continuance of the *time*; as by surrender, forfeiture, or the like. For which reason, if I grant a lease to A. for the term of three years, and, after the expiration of the said *term*, to B. for six years; and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect; but, if the remainder had been to B. from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case, B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s *term*. *Ibid.*

A proviso for the landlord to re-enter on the tenant's committing an act of bankruptcy, on which a commission shall issue, is good. 2 *T. Rep.* 133.

Where there is a proviso not to let, &c. the tenant's administrator cannot underlet without incurring a forfeiture. *Id.* 425. See *v. ASSIGNMENT*.

The value of leases is found out in the same way as the value of annuities for years. See *ANNUITIES*.

No technical words are necessary to constitute a lease; for, any expressions amount to a lease that shew a manifest intention in one party to give the possession of lands to another for a determinate time.

If

If a life drop after a contract for sale, and before the conveyance, the loss falls on the purchaser, if the seller has not delayed the conveyance. *Harr. Pract. Canc. Introd.* 26, 27.

A parole demise for five years is not a good lease for three years by the Statute of Frauds and Perjuries; for, such a demise will only operate as a lease or tenancy at will, by the express words of that statute. 4 *T. Rep.* 680. By the statute above-mentioned, a lease for more than three years must be in writing. 29 Car. II. c. 3. Yet a lease not exceeding three years, in which the rent reserved amounts to two-thirds of the improved value, is good without writing; but all other parole leases or agreements for any interest in lands have the effect of estates at will only. *Bull. N. P.* 279: 2 *Espin. Rep.* 718.

LEGACY.

By 20 Geo. III. c. 28, sect. 1; 23 Geo. III. c. 58, sect. 2; and 29 Geo. III. c. 51, sect. 2; every receipt for a *legacy*, whether pecuniary or specific, or *share of personal estate*, payable to the *wife, children, or grandchildren*, of the deceased, shall be chargeable as follows: Not exceeding £20, 2s. 6d. — Of £20, and under £100, 5s. — Of £100 or upwards, £1. — If payable to *husband or wife*, if not exceeding £20, 2s. 6d. and 2s. 6d. total 5s. — Of £20, and under £100, 5s. and 5s. total, 10s. — Of £100, £1 and £1, total, £2. — And for every farther £100 an additional £1; and, if £400, an additional £1; and, for every farther £100, a farther additional £2.

To *collateral relations* or *strangers*, where under £20, 1s. 2s. and 2s. total, 5s.

And, by the last act, (36 Geo. III. c. 52,) upon any *legacy* of the value of £20, or *share of personal estate*, of a person dying intestate, and leaving a personal estate of the clear

clear value of £100, after payment of debts, &c. which shall pass to a *brother* or *sister* of the deceased, or any *descendants* of a *brother* or *sister* of the deceased, a duty of £2 is imposed for every £100 of the value, and so after the same rate for any greater or less sum.

To a *brother* or *sister* of a *father* or *mother* of the deceased, or any *descendants*, &c. £3 for every £100, &c. as above.

To a *brother* or *sister* of a *grandfather* or *grandmother*, &c. £4, as above.

To any person in any other degree of collateral consanguinity, or any stranger in blood to the deceased, £6 for every £100 of the value; and after that rate for a greater or less sum.

The duties are to be paid by executors or administrators on retaining or paying legacies or shares; and, if the duties be not paid before legacies or shares are retained or discharged, they having deducted it, the amount shall be a debt from them to his majesty; and, if they pay without deducting the duty, it shall be a debt, not only from them, but also from the party receiving.

As to the law relating to legacies or bequests of personal estate, *see the article WILLS.*

LENDING. — *See Hiring.*

LETTER. — *See Agreement, Contract.*

A letter, which is relied on as evidence of an agreement, must be stamped before it can be given in evidence. 23 Geo. III. c. 58, sect. 1: and *Jacob's L. Dictionary. See AGREEMENT.*

But written letters, promising payment of a debt, need not be stamped; they are not under the *Stat. 23 Geo. III.* requiring agreements to be stamped, but fall within the exemptions

exemptions of 25 Geo. III. c. 51, in favour of letters between persons carrying on trade. 5 *T. Rep.* 177.

LETTER OF ATTORNEY.

Stamp 10s. See *AUTHORITY*.

LETTER OF LICENSE. — See *Debtor and Creditor*.

LETTERS OF MARQUE.

If, during a war, a subject, without any commission from the king, should take an enemy's ship, the prize would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee, the admiral. *Carth.* 399. Therefore, to encourage merchants and others to fit out privateers, or armed ships, in time of war, the lord high admiral, or the commissioners of the Admiralty, are from time to time empowered by various acts of parliament to grant commissions to the owners of such ships; and the prizes captured are divided between the owners and the captain and crew of the privateer. See *Stat.* 29 Geo. II. c. 34: 19 Geo. III. c. 67: 24 Geo. III. c. 47: 33 Geo. III. c. 66, sect. 14.

If a letter of marque wilfully take a ship or goods belonging to another nation in amity, it amounts to piracy. *Roll. Abr.* 430.

LEVANT AND COUCHANT. — See *Commons*.

Cattle levant and couchant are such as have been long enough on the land to have laid out and rose up to eat, which in general is held to be one night at least. 2 *Lill. Abr.* 167.

JUDGE BULLER described them to mean the possession of such land as would keep cattle claimed to be commoned during

during the winter ; and, as many as the land will keep in the winter, so many shall be said to be levant and couchant.
5 *T. Rep.* 46.

LIEN. — See *Stopping Goods in Transitu.*

In some instances the law of this country has adopted the summary mode of giving a party, who has a claim upon another, a power to retain his goods if they happen to be in his possession, until payment is made ; and this power of retaining is called a LIEN, which signifies an obligation, tie, or claim, annexed to or attaching upon any property ; without satisfying which, such property cannot be demanded by its owner. And the privilege in question, in most cases, belongs to instances where the debt demanded has arisen out of the thing itself, which is so retained. And upon this principle we may observe in general, that, in the case of a contract for goods, where no time is given for the payment of the purchase-money, the vender may retain the goods ; that is, he may refuse to deliver them till payment is made.

The courts have of late years shewn a strong disposition to favour the doctrine of liens, as highly convenient to trade ; allowing it, first, *where there is an express contract to that effect* ; and, secondly, *where it is implied, either from the usage of trade, or the manner of dealing between the parties.* 4 *Burr.* 2221.

A carrier may retain goods for his hire. *L. Raym.* 166, 752. But there is in this case no lien for warehouse-room, or booking, if the price of the carriage be tendered. 1 *Espin. Rep.* 119.

So may they be retained for freight, tonnage, or salvage. 12 *Mod.* 511 : *Parke*, 131.

And a wharfinger may retain goods brought to his wharf for the balance of a general account. 1 *Espin. Rep.* 109.

Bankers,

Bankers, also, have a lien on bills deposited with them for the balance of a general account. 1 *Espin. Rep.* 66.

As brokers transact the chief part of the business relating to marine policies of insurance, and generally pay the premiums, the law has given them a lien upon the policies in their hands so as to enable them to deduct, out of any moneys they may receive for the assured, not only the premium and commission due on the particular policies, but the general balance due to them on the account between them and their principals. And it has been decided, that, if a broker should part with the possession of the policy, so as to lose his lien upon it, yet, if he get it back into his hands again for any purpose whatsoever, the lien revives. *Cooke's Bankrupt-Laws*, 579.

So a factor, to whom money is due, has a lien upon the goods of his principal while in his possession, not merely for what is due for those goods, but for the balance of a general account. He has also a lien on his money in the hands of the purchaser. 1 *Burr.* 494: 2 *Burr.* 936: 2 *Black. Rep.* 1154: *Cowp.* 251. And, though, in this case, goods had been consigned to a factor by a trader, and the factor knew that the trader was in insolvent circumstances, but he nevertheless advanced him money on the credit of his goods, it was adjudged, that he was entitled to a lien upon them for the money he had advanced, and should hold them against the assignees of the consignor. 1 *Black. Rep.* 193.

A vender of goods, before actual possession by the vendee, has a lien upon the goods he sends; and, if he can get them *in transitu*, where the vendee is bankrupt, he has the benefit of that lien. *Cowp.* 296.

In the case of *manufacturers*, the lien they have upon goods delivered to them to be *manufactured* is not a general one, but is confined to the work done on those particular goods; unless an express usage of trade be proved to the contrary.

So

So that a manufacturer, who takes in goods for a particular purpose, (as a dyer to dye them, or a tailor to make them up into clothes,) has a lien on them *for the work done to the goods themselves*; but he cannot retain them *for any other demand* against the owner of the goods, unless a general usage be shewn. 4 Burr. 2214: 1 Atk. 235.

But the *usage of trade* will create a general lien. As, where it was proved to be the usage for *packers* to lend money to *clothiers*, and the clothes left to be packed were considered as a pledge, not only for the packing, but for *the loan of the money likewise*. And here the bankrupt, who was a clothier, borrowed money on a note of hand from the petitioner, who was a packer, *but at a time when he had no dealings with him*; and the bankrupt having afterwards sent him cloth to pack, it was held that he might retain the cloth for the debt as well as the packing. 1 Atk. 237: Prec. Chan. 580.

An agreement entered into by a number of dyers, pressers, bleachers, &c. at a public meeting, that they would not receive any more goods to be dyed, &c. but on condition that they should respectively have a lien on those goods for their general balance, is good in law, and binds all those who have notice. 6 T. Rep. 14.

A calico-printer has been held to have a lien upon the linen in his possession, not only for the price of printing the particular linens, but also for the price of printing others which had been previously delivered. 1 Cooke, B. L. 460.

A miller has a lien for the price of grinding corn. 1 Atk. 235.

In the case of *pawns*, it is to be observed, that the pawning, from the nature of the thing, creates of itself a lien.

As, where a testator had borrowed a sum of money upon jewels, and afterwards three other several sums, for each of which he gave his note, without taking any notice of the

jewels, it was determined, that the borrower's executors should not redeem the jewels, without paying the money due on the notes; for, it must be presumed that the pawnee trusted to the pledge he had in his hands, by the money being lent subsequent to the pawning, which excluded the presumption of any trust to the person. But, if the loan had been prior to the pawning, there had been no lien.

1 *Atk.* 236: *Prec. Chan.* 419.

An inn-keeper hath by law a right to detain a horse left with him till he is paid for his *keeping*; for, as he is by law compellable to receive a guest and his horse, so he shall have this remedy. And, though in this case the horse had been brought to the inn by a stranger without the owner's knowledge, and was afterwards claimed by the owner, yet it was held, that the inn-keeper might notwithstanding keep the horse till paid; for so, by pretended ignorance that his horse was sent to an inn, might the owner defraud the inn-keeper by getting his keeping for nothing. 1 *Roll. Rep.* 449: 3 *Bulst.* 268. And he may retain other goods of his guest for a *reckoning*. 1 *Salk.* 388.

So that to give this right of retainer to an inn-keeper it is not therefore necessary *that the owner should be a guest*; for, merely leaving his horse at an inn gives the right of retainer till he be paid for his keeping. *Ibid.*

But this power of retainer is only while the horse remains in the inn-keeper's possession; for, if he suffers the horse to be taken away, and the horse is brought again to the inn, he cannot retain him for the former demand.

1 *Str.* 557: 2 *Brownl.* 254.

A creditor may, on the event of his debtor becoming bankrupt, retain money come to his hands, where mutual credit has been given, though his debt is not payable till a future day, and such retainer be contrary to the agreement between them. 7 *T. Rep.* 378.

But

But this right of lien being admitted *for the benefit of trade*, it shall be confined in its operation *to that only*. Therefore, where the owner of five cows put them to depasture with the defendant, and agreed to pay him twelve pence per week for each cow, and afterwards the owner sold them to the plaintiff, it was adjudged that the defendant could not justify detaining them *for their keep*, but was put to his action against the first owner. *Cro. Car.* 271.

So, if a horse be distrained to compel an appearance in the hundred court, after an appearance, the person who took the horse cannot justify detaining him till *paid for his keeping*. *Bull. N. P.* 45.

So, where A. purchased an interest in a lease, and the writings were left in the hands of an attorney to draw an assignment, which he did, and it was executed; it was held, that he could not refuse to deliver them up to A. till paid for it. 1 *L. Raym.* 738.

So, where the defendant paid the duty at the Custom-House for a parcel of goods, the property of the plaintiff, which had come home in the same ship with others of the defendant's, it was held, that he should not retain the goods till paid what he had advanced for the duty; for, he might have his action for his money. 1 *Str.* 651.

So it seems that, where a dog strayed casually to a person's house, where he had kept him twenty weeks, he could not retain him till he paid for his keep. 2 *Black. Rep.* 1117.

A pawnbroker has no lien on plate after the death of a tenant for life who pawned it with him, as against the remainder-man, although the pawnee had no notice of the settlement. 2 *T. Rep.* 376.

Goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be retained for those expenses against the rightful owner. 2 *T. Rep.* 485.

And, in general, no person can, in any case, retain, where there is a *special agreement to pay*; for, then the other party is personally liable. *Bull. N. P.* 45.

And it is to be observed that, as this is only a power of retaining, it therefore cannot, from its own nature, extend to any case where the party, who might otherwise retain, has once parted with the possession. 1 *Str.* 557: 2 *Brownl.* 254.

To this head of liens may be referred the power of stopping goods *in transitu*. "A vender of goods," said my Lord Mansfield, "before actual possession by the vendee, has a lien upon the goods he sends; and, if he can stop them *in transitu*, where the vendee is bankrupt, he has the benefit of that lien." *Cowp.* 296: 2 *T. Rep.* 63. See RETAINER, and STOPPING GOODS IN TRANSITU.

LIFE-ESTATE. — See *Landlords and Tenants, and Tenant.*

A remainder-man may compel the tenant for life to keep down interest on a mortgage, but cannot directly compel him to redeem, though indirectly he may, by purchasing in the mortgage; when the tenant for life must pay one-third, or part with the possession. *Rep. Eq.* 69.

By *Stat. 19 Car. II. c. 6*, where persons, for whose lives estates are held, shall absent themselves for seven years, they shall be presumed to be dead. And, by *Stat. 6 Anne, c. 18*, persons, for whose lives estates are held, are, on application to the Lord Chancellor, to be produced.

LIGHT-HOUSES.

British ships, in passing by the *Eddystone* light-house, and others in the channel, sailing from foreign port to foreign port, and not touching at any place in *Great Britain* or *Ireland*, are not liable to pay the light-house duties to the
Trinity-

Trinity-House, under the *Stat.* 4 Anne, c. 20, and 8 Anne, c. 17. 3 *T. Rep.* 768.

LIGHTS.

If ancient lights are stopped, an action lies; and it is now held, that lights will be considered as ancient to support this action, of which there has been an uninterrupted enjoyment above twenty years. *Mod. Caf.* 116, 314: 3 *Bl. Com.* 217, n.

LIMITATIONS OF ACTIONS.

The limitation of actions, by 21 Jac. I. c. 16, is as follows:

All actions of trespass, (*quare clausam fregit*, or otherwise,) detinue, trover, replevyn, account, and case, (except upon accounts between merchant and merchant,) debt on simple contract, or for arrears of rent, must be brought within six years.

Actions of assault, menace, battery, mayhem, and imprisonment, within four years; and actions of slander within two years.

Infants, feme-coverts, persons *non compos mentis*, imprisoned, or beyond sea, may sue within those periods after *full age, discover, sane memoria, at large, or returned*.

1. As to *infants*: observe, that, if an *infant*, during his infancy, by his guardian, bring his action, the defendant cannot plead the Statute of Limitations; although the cause of action accrued six years before, and the words of the statute are, after his coming of age, &c. 2 *Saund.* 121.

2, 3, 4. *Feme-coverts, persons non compos, and imprisoned*, are excepted for the same reason as the others, *i. e.* on account of their incapacity to prosecute their actions.

5. The clause as to *persons beyond sea* extends only to such as are actually so. Therefore, if a person be in *Scotland*, it is not sufficient. No length of time of absence out of the kingdom will bar the right of action; for, the statute doth not begin to run till the person returns into the kingdom. 1 *Espin. Dig.* 149, 150.

The exception extends only to cases where the *creditors* or *plaintiffs* are so absent, and not to *debtors* or *defendants*; because the first only are mentioned in the statute. *Cro. Car.* 245, 333: 1 *Jon.* 252: 1 *Lev.* 143: 3 *Mod.* 311: 2 *Lutw.* 950: 1 *Salk.* 420.

If one of a number of partners be abroad, if the others live in *England*, the action must be brought within six years after the cause of action arises. 4 *T. Rep.* 516.

A resident in *England*, when the debt arose, but dying abroad, his representatives must sue within six years. 1 *Wilf.* 134. And so, if the plaintiff be in *England* at the time when a cause of action accrues, the time of limitation begins to run; so that if he, or (if he dies abroad) his representative, does not sue in six years, he is barred by the statute. 1 *Wilf.* 135.

A plaintiff, who is a foreigner, and is always resident abroad, is not within the statute, but has his remedy at any time. *Black. Rep.* 723: 3 *Wilf.* 145.

6. It hath been a matter of much controversy, whether the exception relative to *MERCHANTS ACCOUNTS* extends to *all actions* and *accounts* relating to merchants and merchandize, or to *accounts open and current only*. And it is now settled, that the latter only are within the statute; that, therefore, if an account be stated and settled between merchant and merchant, and a sum certain be agreed to be due to one of them, if he, to whom the money is due, does not bring his action within the limited time, he is barred by the statute. 1 *Jon.* 401: 2 *Saund.* 124, 5: 1 *Lev.* 287, 8;
2 *Keb.*

2 *Keb.* 622: 1 *Vent.* 90: 1 *Mod.* 270: 2 *Mod.* 312: 2 *Vern.* 456.

So it hath been adjudged, that, by the exception in the statute concerning merchants accounts, no other actions are excepted but actions of *account*. *Carth.* 226.

Also it hath been adjudged, that bills of exchange for value received are not such matters of account as are intended by the exception in the Statute of Limitations. *Ibid.*

It has been held, that, if there be a *MUTUAL* account of any sort *between tradesmen* or others, for any *item* of which credit has been given within six years, that is evidence of an acknowledgement of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute. 6 *T. Rep.* 189.

But the exception does not extend to a *tradesman's* account with his *customer*, because these are not mutual dealings; and the tradesman is barred from recovering for more than those articles which have been sold within six years. *Bull. N. P.* 149.

7. Under the equity of the statute, in all cases of executors, if the six years be not elapsed at the time of the testator's death, and the executor takes out proper process within the year, it will save the bar by reason of the limitation, even though the six years, within which the demand accrued, be elapsed before process sued out. *Bull. N. P.* 150.

If there be no executor, against whom the plaintiff may bring his action, he shall not be prejudiced by the statute; nor shall any laches be imputed to him. 2 *Vern.* 695.

If time begins to run, the intervention of a legal disability, in the person having right, will not prevent the time going on against him. *Pow. Mort.* 139: 3 *T. Rep.* 300, 306.

The statute only bars the legal remedy. 1 *Salk.* 154: 2 *Vern.* 141: *Cooke's B. L.* 11. See BANKRUPT.

And it seems clearly agreed, that, though the Statutes of Limitation bind the courts of equity, that yet a trust is not within these statutes. *March*, 129: 2 *Salk.* 124.

A charity is not barred. 2 *Vern.* 399. Nor a legacy. 1 *Vern.* 256. Nor a mortgage. 1 *Chanc. Caf.* 102.

A general acknowledgement (without an express promise) is sufficient to take a demand out of the Statute of Limitations. 1 *Espin. Rep.* 435: 2 *Black. Rep.* 703.

A very slight acknowledgement is now held sufficient, and this agreeably to the sense and spirit of the statute, which is not for preventing debts being paid merely on account of the length of time they have been due, but to establish a security against fraudulent demands, when vouchers perhaps are lost, or witnesses to a payment, made without written proof, are dead. 1 *Gillb. Evid.* 410: *Carth.* 470: *Abr. Eq.* 305.

A letter, written by a defendant (who pleaded the Statute of Limitations) to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amounts to an acknowledgement. 2 *T. Rep.* 760.

A promise to pay by a servant or agent, intrusted by a party to transact his business, is sufficient to take a case out of the Statute of Limitations. 2 *Espin. Rep.* 511.

Where there are two or more drawers of a joint and several promissory-note, the acknowledgement of one may be given in evidence in a separate action against another, and will defeat the effect of the statute. *Doug.* 629.

The statute runs from the time the debt becomes due on a bill or note, and not from the date. *H. Black.* 631.

If a debt or duty is to arise from an *executory consideration*, as, for payment on request made, or other act to be done,

done, the statute runs from the time of the *request* made or act done only, and not from the time of the precedent *promise*. *Cra. Car.* 98 : 1 *Esp. Dig.* 156 : 2 *Salk.* 422 : *Bull. N. P.* 151.

8. As to *slander*, observe, that the statute does not extend to cases of slander, where special damage is the gist of the action. *Bull. N. P.* 11.

9. Actions of *crim. con.* may be brought within six years; for, the criminal conversation, and not the assault, is the gist of the action. *Id.* 28.

10. If plaintiff in ejectment sues for profits accrued antecedent to the date of the demise laid in the declaration, the defendant may plead the Statute of Limitations, and by that means protect himself from the payment of all mesne profits, except those which have accrued in the last six years. *Bull. N. P.* 88.

N. B. If a person has a debt owing to him, and the party is abroad, so that the statute is likely to bar his remedy; or, if the creditor for private reasons deems it imprudent to sue the debtor; there is a mode by which he may save himself from the operations of the statute, of which a skilful attorney will enable him to avail himself.

LIMITATIONS OF ESTATES. — See *Marriage-Settlement*.

Where a man takes an estate by *purchase*, he takes it not as a paternal or maternal fee, which would descend only to the heirs by the father's or the mother's side, but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs in general, first of the paternal, then of the maternal, line. When he takes it by *descent*, he takes it as a paternal or maternal fee, and it descends only on the heirs by that side from which it descended.

Words

Words of limitation are such as do not give the estate imported by them originally to the heirs, &c. described, or to whom they are expressly directed, but only extend the ancestor's estate, whether immediately, mediately, or eventually, to an estate of inheritance descendible to the heirs described, subject to the disposition, if any, interposed between the two limitations.

Words of purchase are such as give the estate thereby imported originally to the heirs, &c. described, and not through the medium of a descent from the ancestor.

The clause without *impeachment of waste*, and the limitation to trustees to support contingent remainders, make the intent clear, that the words *heirs of the body* should be taken as words of purchase.

Note. — An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will.

The only substantial difference between a limitation to A. and his heirs, and a limitation to him for life, remainder to B. in tail, remainder to the right heirs of A. appears to be this; that, in the first instance, A. takes the entire estate in fee; and, in the other, he takes it subject to the estate tail in B. The words *his heirs*, in either case, operate equally as words of limitation; viz. words giving the estate imported by them not originally to the express objects of the description, but extending the ancestor's estate immediately in the one case, and mediately in the other, to them by descent, and limiting the ultimate bounds of the estate which he is to take.

See much learning on this subject in Mr. Fearne's most excellent Essay on contingent Remainders and executory Devises.

LONDON,

LONDON, CUSTOMS OF. — See *Apprentice, Foreign Attachment.*

If a freeman of London dies, leaving a widow and children, his personal estate, after his debts are paid, and the customary allowance for his funeral, and the widow's chamber being first deducted, is to be divided into three equal parts, and thus disposed of: one-third part to the widow, another to the children unadvanced by him in his life-time, and the other third part the freeman may bequeath by will. But, if he has no wife, but has children, the half of his personal estate belongs to his children, and of the other half he may dispose by his will. 1 *P. Wms.* 340: 1 *Bro. Prec. Chanc.* 254. But it extends only to personals. 1 *Eq. Ca. Abr.* 150: 2 *Vez.* 593. See *Stat.* 11 *Geo. I. c.* 18, sect. 17, which has made certain regulations on this subject.

LOST GOODS, &c. — See *Finding.*

LOTTERY-INSURANCE. — See *Contracts.*

An action for money had and received will not lie to recover money paid for an illegal insurance in the lottery, and by the insurer re-insured with the defendant for his own security. 1 *Espin. Rep.* 432.

MANAGER. — See *Agent.*

MANOR. — See *Copyholds.*

There must be two tenants at least, or the manor itself is lost. 2 *Bl. Com.* 91.

There is no manor in law, where there are no freehold tenants; nor a customary manor, without copyhold tenants. 1 *Inst.* 58: 2 *Roll. Abr.* 121.

The boundaries of manors and of parishes afford no evidence or inference of the boundaries of each other.

MANU-

MANUFACTURES. — See *Journeyman*.

MARITIME COURTS.

If there be a contract made in England, and to be executed on the seas, as a charter-party or covenant that a ship shall sail to *Jamaica*, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on ship-board to pay money in London, or the like; these kind of mixed contracts belong not to the Admiralty jurisdiction, but to the courts of common law. And indeed it hath been farther holden, that the Admiralty-court cannot hold plea of any contract under seal. *Hob. 12, 112: Hal. Hist. Com. Law, 35.*

In case of prizes, in time of war between our own nation and another, or between two other nations, which are taken at sea and brought into our ports, the Courts of Admiralty have an exclusive jurisdiction. 3 *Black. Com.* 108.

MARKETS. — See *Horses, Toll, and Pawning.*

New markets and fairs, with the tolls belonging, cannot be established but by virtue of the king's grant. Where no grant appears, immemorial usage and prescription presuppose one.

If I am entitled to a fair or market, and another person sets up one so near mine as to do mine a prejudice, it is a nuisance to the freehold which I have in my fair or market. But in order to that it is necessary, 1. That mine be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. So that, if it be not within seven miles of the old one, it is no nuisance. 1 *Inst.* 406; 2 *Inst.* 567; *F. N. B.* 184.

A market overt in the country is only held on the special days provided for particular towns by charter or prescription;

tion; but, in London, every day, except Sunday, is market-day. And whereas, elsewhere, the only market overt is the place of keeping the market, and which is set apart for the sale of particular goods, yet, in London, every shop, in which goods are exposed publicly to sale, is a market overt. *Cro. Jac.* 68: *God.* 131: 5 *Rep.* 83: 12 *Mad.* 521.

All contracts for any thing vendible in markets, &c. shall be binding; and sales alter the property, if made according to the following rules: 1. The sale is to be in a place which is open, so that any one passing by may see it, and be in a proper place for such goods. 2. It must be an actual sale for a valuable consideration. 3. The buyer is not to know that the seller hath a wrongful possession of the goods sold. 4. The sale must not be fraudulent between two to bar a third person of his right. 5. There must be a sale and a contract by persons able to contract. 6. The contract must be originally and wholly in the market overt. 7. Toll ought to be paid where required by statute, &c. 8. The sale is not to be in the night, (or on a Sunday,) but between sun and sun; although, if the sale be so made, it may bind the parties. 5 *Rep.* 83.

And it is to be observed, that a shop is only good as a market overt, where a thing is bought which appertains to the trade of that shop; as plate at a silversmith's, &c.; but not if bought in a back shop, or place not open. *Cro. El.* 454: 3 *Cro.* 83, *S. C.*: *Moor*, 300.

If a person erects stalls in a market, and does not leave room for the people to stand and sell their wares, so that they are thereby forced to hire such stalls, the taking money for the use of them in that case is extortion. 1 *L. Raym.* 149; *Dig. Adj. Caf.* 484. Trespass lies by the owner of the soil for erecting a stall in a public market.

Tolls are not due in fairs and markets but by grant or prescription; and no toll is due till the thing be sold, except

cept by custom out of mind; and, upon such sale, the toll is to be paid by the buyer. 2 *Inst.* 222.

If a person liable to toll refuses, an action on the case lies. 1 *Roll. Abr.* 103, 4, 6.

MARRIAGE, PROMISES OF.

Action will lie for breach of promise of marriage, but the promise must be on both sides. 1 *Salk.* 24. And, though no time be fixed, if the plaintiff prove tender and refusal, it is sufficient. So if the defendant marries another person. *Carth.* 467.

Where a promise of marriage has been made and broken, and an action is intended, but the party offending is not married to any other person, it is necessary for the party injured, in the presence of a witness, to make an offer to fulfil the engagement, and to require the other to do the like. If it cannot be done personally, a written notice should be sent by a person who saw it signed, and who should keep a copy.

The words of the *Stat.* 29 Car. II. c. 3, upon any agreement in consideration of marriage, do not relate to mutual promises of marriage. A promise of a father, by letter, to give money in marriage with his daughter, is a sufficient promise in writing within the statute. 2 *Vent.* 361.

MARRIAGE-SETTLEMENT. — See *Jointure*.

If A. articles before marriage to settle estates to the intended husband and wife for life, remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation; and, in such case, no act of the father or of the trustees can defeat the estate. *Fearne*, 126.

Where the limitation in such articles imports an estate tail, either in that parent from whom the estate moved, or
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in both the parents, it is in the power of the father alone during the coverture, or of the settling parent alone after the death of the other, to bar the issue; and that power is not restrained to the concurrence of both parties. *Fearne*, 131.

There may be words of limitation in a will, which are words of purchase in marriage-articles. *Id.* 185.

MASTER AND SERVANT. — See *Journeymen, Surety*.

The *Stat.* 32 Geo. III. c. 56, imposes a penalty of £20, and 10s. costs, for giving a servant a false character.

A. gave a false character of B. to C.; C. took him into his service, B. robbed him, and C. recovered in an action against A. for the whole extent of his loss. 2 *Black. Com.* 432, n.: *Trin.* 1792, at *Guildhall*.

It is said that a master may justify an assault in defence of his servant, and a servant of his master. 2 *Roll. Abr.* 546. But Q. as to the former, see *Salk.* 407.

If a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of the trespass. Not that the servant is excused; for, he is only to obey his master in matters that are honest and lawful. 1 *Black. Com.* 430.

The servant of a carman run over a boy in the street, and maimed him by negligence, the master is liable. 1 *L. Raym.* 739.

In such a case, the servant cannot be a witness for his master, without a release, because he is answerable over to him. *Str.* 1083.

Wherever a man acts contrary to his duty, whereby another receives damage, or is rendered responsible or liable to damages, he may maintain an action, *ex delicto*, against the person who so subjected him. 1 *Espin. Rep.* 340.

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The cases, in which a master is held liable for damage done to third persons by his servant, have been determined on the ground, that it must be presumed that the servant acted under the order of his master; and, therefore, although, generally speaking, a master would be held liable if the servant drives his carriage against that of a third person; yet this may perhaps be considered with some limitation. Suppose a master should order his servant not to take his horses and carriage out of the stable, and the servant should do it in defiance of his master's orders, there is no authority which says that the master shall be liable for any injury done to another by such an act of the servant. 2 *Com. Abr.* 407. This distinction was recognized by Lord Kenyon in the case of *M^r Manus v. Cricket, Sitt. after East. T. 1800*, at Guildhall; where his Lordship observed, that the defendant was civilly responsible for what his servant did in the prosecution of his business. In this instance, the servant was defendant's coachman, and the master was held liable for an injury done by him in driving his carriage, although he was not riding in it at the time.

Whatever a servant is permitted to do in the usual course of his business is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it. If I pay it to a clergyman's or physician's servant, whose usual business it is not to receive money, and he embezzles it, I must pay it over again. 1 *Black. Com.* 430.

A wife, a friend, or relation, that has used to transact business for a man, is *quoad hoc* his servant, and the principal must answer for the conduct of such person; for, the law implies that they act under a general command: and, without such a doctrine as this, no intercourse could subsist between man and man. *Ibid.*

If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant has upon trust; for, here is no implied order

order to the tradesman to trust my servant. But, if I usually send him upon trust, or sometimes upon trust and sometimes with money, I am answerable for all he takes up; for, the tradesman cannot possibly distinguish when he comes by my order, and when on his own authority. And if I once pay for what my servant has bought upon trust, without expressing any disapprobation of it, it is equivalent to a direction to trust him in future, and I shall be answerable till an express order be given to the tradesman not to give him any farther credit. *Ibid.*

Where an agreement exists between a master and a servant that the servant shall provide certain articles, (as, in the present case, shoeing and medicine for his horse at five guineas a year,) yet the master is liable to any tradesman the servant may employ, unless he has notice of the agreement. *1 Espin. Rep. 317.*

The act of a servant shall not bind the master, unless he acts by the authority of his master; and, therefore, if a master sends his servant to receive money, and instead of money he takes a bill, and the master, as soon as he is told thereof, disagrees, he is not bound by this payment. But the master's acquiescence, in any small degree, will be evidence of his consent, and that will make the act of the servant the act of the master. *2 Salk. 442: 2 L. Raym. 928.*

If a servant, who has been used to take up cash for his master, be discharged, and he afterwards takes up cash before notice is given, or his discharge is notorious, the master is liable. *12 Mod. 346.*

An action will lie for enticing away my servant and retaining him; but, if a man retain another person's servant, not knowing that he was so, no action will lie, if he delivers him up on notice given him. *F. N. B. 167, 8: Idem, 390: 2 Saund. 169: Winch. 51.*

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In case an action is brought for enticing away, or retaining, or employing, a servant, it is advisable to give notice to the intended defendant, that the party is servant to the plaintiff, and to demand him; and, proving such notice, and a subsequent employment during the time for which the plaintiff hired, retained, took, and engaged, the servant, will entitle the plaintiff to a verdict. But proof must be added of the contract between the plaintiff and the servant, and that the time was not expired. *New N. B.* 374, 375.

And an action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or knew when he employed him that he was the servant of another. 2 *Lev.* 68: 6 *T. Rep.* 221.

A journeyman in any trade is a servant, while in the employment of the master-tradesman; and an action lies for enticing him away, even though such journeyman only worked by the piece, and for no certain time. *Cowp.* 54.

But no action will lie for seducing an articulated servant from his master, if the servant has paid the penalty, stipulated by the articles, for leaving him. 3 *T. Rep.* 1345: 1 *Black.* 373, 387.

It seems that an action will lie against a master at the suit of a surgeon for medicines, &c. administered to the servant, while such servant is a part of the family, and under his roof. 1 *Espin. Rep.* 270. But, Q. whether it will lie at the suit of the parish-officers, who have paid a surgeon? — Lord Mansfield, in the case of *Newby v. Wiltshire*, declared, that the parish is bound to take care of accidents. 2 *Espin. Rep.* 739.

MASTERS OF VESSELS.

Masters of vessels are answerable as common carriers, although the goods be lost in a storm, which is the act of God,

God, in case any neglect appears through the master's absence or the like, if it should appear that the vessel might have been saved, if proper assistance had been given. *M. S.*

MEASURES.

If a man grant 100 acres of land in such a field, and 60 in such a field, and 20 acres of meadow in such a meadow, in which fields or meadows the acres are known by estimation, the acres shall be taken as they are so known, be they more or less than the statute. But, if I have a close, containing, by estimation, in aggregate 20 acres, and which by the statute is not 18 acres, and I grant 10 of these acres, the grantee shall have them according to the measure of the statute; because the acres of such a close are not known by estimation, by parcels, or by metes and bounds, though the close be estimated in the aggregate. *Poph. 55.*

And the meaning of words expressive of quantity and the like shall be determined by the usage of the words where spoken; and, therefore, tods, pounds, bushels, yards, ells, perches, &c. shall be accounted, measured, and reckoned, according to the custom of the country or place where they are. *Shep. Abr. 172.* But, *Q.* as to such weights and measures as are appointed by statute? See *WEIGHTS.*

The easiest and most usual way of punishment for selling by false measures is by levying, on a summary conviction, the forfeiture imposed by the several acts of parliament adapted to particular frauds. It is, however, an indictable offence at common law.

MENACE. — See *Durefs.*

If a man's business be interrupted through fear, occasioned by threats and menaces, he is entitled to recover pecuniary damages by action of trespass. 3 *Black. Com. 120.*

Action lies for threatening workmen to maim and prosecute them, whereby the master loses the selling of his goods, the men not daring to go on with their work. *Cro. J.* 567.

MESNE PROFITS.

This action, if properly brought, will not only recover the profits received by the defendant, but the costs of the ejectment also.

In this action the plaintiff cannot recover rent for any longer time than from the commencement of the supposed lease, whatever he may be otherwise entitled to. *Scheif.* 194. Where there is a judgement by default, plaintiff may in this action recover the costs; but, where the ejectment has been defended, and the plaintiff recovered and taxed his costs, he cannot recover above his taxed costs. 1 *Espin. Rep.* 359. This being an action of trespass, there must be damages to the amount of 40s. in order to entitle the plaintiff to full costs. *Ibid.*

MISTAKE. — See *Acquittances.*

When a man, being unacquainted with all the circumstances of a case, or, knowing the circumstances, misapprehends the law acting upon them, pays money which he might not have paid, he may recover it back; but he shall not where he knows all the facts explicitly, and is under no misapprehension as to the law: for, in such case, if he chooses to pay a sum of money, *volenti non fit injuria*, he shall not recover it back again.

If money, which there was no ground to claim in conscience, be paid on a mistake of fact, it may be recovered back. 2 *Burr.* 1010: 1 *Salk.* 22: *Skin.* 412: 6 *Mod.* 161: 1 *T. Rep.* 285. Except where it is paid into court, in which case it cannot. 2 *T. Rep.* 648. Or where it is paid by

by a party, knowing at the time that the other had no right to receive it. 1 *Espin. Rep.* 279: 2 *Espin. Rep.* 546.

It is the same thing whether the party pays his money by mistake, or through fraud in the receiver. *Skin.* 412: 1 *Salk.* 22.

Where money has been paid by *John* to *Robert* under compulsion of legal process, and it is afterwards discovered that the money was not due, *John* cannot recover it back in an action for money had and received. 7 *T. Rep.* 269.

And, with respect to mistakes proceeding from ignorance of law, it is by no means true, that they are universally relievable in equity, or in an equitable action at law; as, when a man, not knowing he was discharged from a debt by the Statute of Limitations, pays the debt: or, being bound in honour and conscience to any particular payment, makes such payment: for, in all cases in which money is to be recovered back merely upon principles of equity, the governing question is, whether the defendant can, with a safe conscience, retain what he has received. 2 *Black. Rep.* 824: 2 *Burr.* 1012: 4 *T. Rep.* 561: 3 *Atk.* 573: 3 *P. Wms.* 127, n.

MONEY. — See *Coin*.

MONOPOLIES. — See *Forestalling*.

Monopolies by the common law are void, as being against the freedom of trade, and discouraging labour and industry, and putting it in the power of particular persons to set what price they please on a commodity. See *Hawk. P. C.*

MONTH. — See *Calendar, and Time*.

MORTGAGE.

A mortgage is defined to be a pawn of lands or tenements for money borrowed, to be the creditors for ever, if

the money be not paid at the time agreed. But, on the mortgagor's paying the interest of the money, mortgages are continued a long time, without disturbing the possession or parties.

Till failure in payment of the money, the mortgagor usually holds the lands; and, if failure be made, whereby an entry is made by the mortgagee, yet the mortgagor hath an equity of redemption, and may call the mortgagee to account. And a covenant to restrain the equity of redemption is not regarded in Chancery; but the mortgagee may bar the equity of redemption, and oblige the mortgagor to pay what is due, or be foreclosed, which the Court of Chancery will order in convenient time. *Lill. 332: 1 Inst. 205: 2 Vent. 365.*

As to the nature of the estates of the mortgagor and mortgagee, it seems to be settled, that the mortgagor, till the equity of redemption be foreclosed, is considered as the owner of the land; and the mortgagee as holding the land merely in the nature of a pledge or security for payment of his money. And, on this principle, a mortgage, though in fee, (the legal estate in which descends to the heir-at-law,) is considered in equity only as personal estate. *2 Vern. 67, 401: 2 Fonbl. Eq. 261, 289: Prec. Chanc. 71: 3 Atk. 559.*

The mortgagor's estate is in equity an actual estate, which may be devised, granted, and entailed, and of which there is a *possessio fratris*, and a tenancy by the curtesy. *1 Atk. 603.* But, as to his possession of the mortgaged premises, he only holds them by the will or permission of the mortgagee, who may, by ejectment, and without notice, recover against him or his tenant. *Doug. 21. See EJECTMENT.*

And the mortgagee may grant leases, and avoid such as have, since his mortgage, been granted without his consent by the mortgagor. *2 Fonbl. Eq. 262.*

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The personal estate of a mortgagor shall, in favour of the heir, be applied to discharge the mortgage, if there be personal assets to pay all debts and legacies. 1 *Infl.* 206, 210: 2 *Vent.* 348: *Chanc. Rep.* 286: *Salk.* 450.

By the *Stat.* 4 and 5 W. and M. c. 16, if persons, having once mortgaged lands, mortgage the same a second time, without discovering the first mortgage, they shall forfeit their equity of redemption, and the second mortgagee may redeem, &c. The mortgagor should give to the second mortgagee notice in writing, under his hand, of all prior incumbrances. *Powell on Mortgages*, 150.

Mortgages are not relievable in Chancery after twenty years, where no demand is made or interest paid; except there appear particular circumstances, as in cases of infants, married women, &c. 1 *Eq. Abr.* 313, B.: 2 *Bro. Ch. Rep.* 399.

An ejectment will lie by a mortgagee against a tenant under a lease from the mortgagor, subsequent to the mortgagee, without notice to quit. *Doug.* 21.

But, if there be a tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to fix months notice from the mortgagee. *Ibid.*

A lessor under a lease prior to the mortgage may not avail himself of such lease on an ejectment by the mortgagee, if he had notice before the action that the mortgagee did not intend to turn him out of possession. *Ibid.* 23, n.

A mortgagee, after giving notice of the mortgage to the tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards; and he may distrain for it after such notice, without bringing an ejectment. *Doug.* 279 to 283.

A mortgagee, refusing to receive his money on tender after forfeiture, will lose his interest from the time of the tender; but then notice of paying off the mortgage must

have been given to the mortgagor at least six calendar-months before, and the money must have been tendered on the day of the determination of that notice. But it seems that the plaintiff ought to make an oath that the money was always ready and no profit made of it, which may be controverted by the mortgagee, who may prove the contrary; viz. that the mortgagor was not ready to pay it; in which case the interest must run on. The tender must be to the person of the mortgagee. *Pow. Mort.* 411, 12, 13.

But, if a time and place be appointed, he need not seek for the mortgagee to be in any other place but that mentioned, and there no longer than the time specified in the mortgage. *Id.* And so it is, although a place be not appointed in the proviso, if the mortgagor give notice where he will pay it off. *Id.* 414.

But if there be a deed of assignment, presented to be executed at the time of the tender, in which there are covenants, the mortgagee is entitled to lay it before his attorney, and shall have reasonable time to do so, before the interest shall stop. *Id.* 415.

In a mortgage of a lease, it is folly to take an assignment of the whole term; because the mortgagee subjects himself to the covenants in the original lease. It should be done by a derivative lease of all the term, but a month, week, or day. 2 *Vern.* 275, 374. But, *Note*, he is not liable to those covenants, unless he takes actual possession. *Doug.* 438.

The method of stating a mortgage-account, where the rents received by the mortgagee are greater than the interest, and will of course reduce the principal, is as follows:

A. lends £1000 to B. at £5 per cent. interest, to be paid half-yearly; for securing which, B. mortgages a house of the yearly value of £72, which is received by the mortgagee half-yearly from March 25, 1793, the time the money was advanced; and at the end of two years B. pays back the mortgage-money.

Principal

	£.	s.	d.
Principal money advanced - - - - -	1000	0	0
Interest to Michaelmas, 1793 - - - - -	25	0	0
	<u>1025</u>	<u>0</u>	<u>0</u>
Received half a year's rent - - - - -	36	0	0
Paid land-tax - - - - -	7	0	0
	<u>29</u>	<u>0</u>	<u>0</u>
Interest - - - - -	25	0	0
	<u>4</u>	<u>0</u>	<u>0</u>
Excefs - - - - -			

Deduct this £4 from the principal advanced, and it shews the principal due at the end of the first half-year to be £996.

The second half-year's account.

	£.	s.	d.
Received half a year's rent - - - - -	36	0	0
Paid quit-rent - - - - -	2	0	0
	<u>34</u>	<u>0</u>	<u>0</u>
Interest on £996 for six months, - - - - -	24	18	0
	<u>9</u>	<u>2</u>	<u>0</u>
Principal - - - - -	996	0	0
Deduct the excefs - - - - -	9	2	0
Amount of principal, Lady-Day, 1794 - - - - -	<u>986</u>	<u>18</u>	<u>0</u>

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The third half-year's account.

	£.	s.	d.
Received half a year's rent -	36	0	0
Paid land-tax - - - - -	7	0	0
	29	0	0
Int. on £986 18 s. for 6 months,	24	13	0
	4	7	0
Principal - - - - -		986	18 0
Excess - - - - -		4	7 0
Amount of principal at Michaelmas, 1794 -		982	11 0

The fourth half-year's account.

	£.	s.	d.
Received half a year's rent - -	36	0	0
Paid quit-rent - - - - -	2	0	0
	34	0	0
Int. on £982 11 s. for 6 months,	24	11	3½
	9	8	8½
Principal - - - - -		982	11 0
Excess - - - - -		9	8 8½
Amount of principal to be paid at the end of two years - - - - -		973	2 3½

If lands mortgaged are devised by the mortgagee to A. for life, afterwards to B. in fee, and the mortgagor redeems the lands, A. shall have one-third, and B. two-thirds, of the mortgage-money. 1 Vern. 70.

A remainder-man can force the tenant for life to keep down interest on a mortgage, but cannot directly compel him to redeem, though indirectly he may, by purchasing in the mortgage; when the tenant for life must pay one-third, or part with the possession. *Rep. Eq.* 69.

It has been said to be an established rule of equity, that a second mortgagee, who hath the *title-deeds* without notice of any prior incumbrance, shall in all cases be preferred; because, if a mortgagee lend money upon real property, without taking the title-deeds, he enables the mortgagor to commit a fraud. *1 T. Rep.* 762. But Lord Thurlow, C. afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to postpone the first mortgage; if it were so, there could be no such thing as a mortgage of the reversion; and he held, that a second mortgagee, in possession of the title-deeds, was preferred only in cases where the first had been guilty of fraud or gross negligence. *2 Bro. Ch. Rep.* 652. And, to escape that imputation, it seems that he must shew it was impossible for him to obtain possession of the title-deeds, or that he had used due diligence for that purpose. *2 Black. Com.* 160, *in n.* — See *1 Fonbl. Eq.* 155, where the rule of equity is thus stated, (on the ground of a solemn judgement in the Court of Exchequer,) that nothing but a voluntary, distinct, and unjustifiable, concurrence, on the part of the first mortgagee, to the mortgagor's retaining the title-deeds, shall be a reason for postponing his priority.

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security to be certain that there is no prior mortgage upon the estate; for, it has been long settled, that, if a third mortgagee, who, at the time of taking his mortgage, *had no notice* of the second, purchases the first mortgage, even pending a bill filed by the second to redeem the first, both the first and third mortgages shall be paid before any share of the estate can

can be appropriated to the second. See 2 Vent. 337: 1 Chanc. C. 162. But, among mortgages where none has the legal estate, the rule in equity is, *that he who is first in time shall prevail in law.* 2 P. Wms, 491: 1 Bro. Chanc. Rep. 69. Some reflections have been made by Mr. Christian on the above doctrine; (2 Black. Com. 160, in n.) but it seems perfectly consistent with the maxim, that the law favours vigilance.

It is well observed by Blackstone, (2 Com. 160,) that, in Glanvil's time, when the universal method of conveyance was by *livery of seisin*, or corporal tradition of the lands, no gage or pledge of lands was good, unless possession was also delivered to the creditor; for which the reason given is, to prevent subsequent and fraudulent pledges of the same land. Glanv. lib. x. c. 8. And the frauds which have arisen since the exchange of these public and notorious conveyances, for mere private and secret bargains, has well evinced the wisdom of our ancient laws.

MURDER.

Murder is the wilful killing of a man upon malice aforethought, and it may be committed in divers manners; as by weapon, poison, crushing, bruising, smothering, strangling, drowning, &c. 3 Inst. 47, 319: 2 Hal. P. C. 185.

It is malice which constitutes murder, and this is either express or implied; express, when it may be evidently proved there was formerly ill-will, and the killing is with a sedate mind and formed design of doing it; implied, when the law implies enmity where none can be proved, as if one kills another, suddenly, without provocation. 1 Hal. P. C. 451.

MUTUAL DEBTS.

Formerly it was a maxim, that stoppage is no payment; that is, the setting off debt against debt was not then equivalent

valent to actual payment. But, since the *Stat.* 2 Geo. II. c. 22, and 8 Geo. II. c. 24, one debt may be set off against another, so that a tender of the balance is held to be sufficient.

But a debt due to a man in right of his wife cannot be set off in an action against him on his own bond. Nor can a penalty upon articles of agreement, though forfeited. Nor simple contract for clothes to a bail-bond. Nor can there be a set off in replevyn, though the distress was taken for rent. Nor can a bond be set off at the suit of assignees of a bankrupt to an action by them for goods sold and delivered. Nor, generally speaking, in actions upon the case, trespass, or replevyn. See *Tidd's Pract. K. B.*

MUTUAL PROMISE. — See *Act, Contract.*

NATIONS, LAW OF.

The rules on which Courts of Admiralty profess to proceed are the *law of nations*, and such *treaties* as particular states have agreed shall be engrafted on that law. But an *arrêt*, or *ordinance*, is of another kind. A *treaty* is a contract made by the contracting parties, and the other an *ex parte* law, made by one nation only, to which no other state is a party. And it is not competent to one nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. 8 *T. Rep.* 437.

NAVY-BILLS.

Navy or victualling bills are bills or orders for payment of money, issued by the commissioners of the navy, for stores, &c. purchased. They were not formerly payable at any determinate period, but carried interest at £4 per cent. from the end of six months, from the time of their being registered at the proper office. They have been generally paid

paid off within eighteen months or two years from the time of their being issued; but, in 1794, all navy and victualling bills were made payable on a certain day, to be expressed in each particular bill, which day was not to exceed fifteen months from the date of the bill. And navy, victualling, and transport, bills are, by the *Stat. 37 Geo. III. c. 26*, made payable not later than three calendar-months from the date of such bill; and the present practice is to make them payable at ninety days date, bearing interest at $3\frac{1}{2}d.$ per cent. per diem, commencing from the date of the bill, and payable with it.

These bills, being negotiated as bills of exchange, of course cannot be bought and sold at a discount.

Pursers of ships are paid their balances in victualling-bills.

On the sale of navy and victualling bills, the discount is deducted from the amount, and the interest due thereon added. The brokerage is $2s. 6d.$ per cent. on the amount expressed in the bill. Navy, ordnance, and other bills, under £20, are transferrable by a stamped receipt; all above, by letter of attorney, and bill of sale, stamped. *Fairman's Stocks Examined, 9.*

NECESSITY, INEVITABLE: — See *Accident*.

The law charges no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; therefore, if there be an impossibility for a man to do otherwise, or so great a perturbation of the judgement and reason as in presumption of law he cannot overcome, such necessity carries a privilege in itself. *Bac. Elem. 25.*

A. with a little dog chafed B.'s sheep out of his ground, where they were trespassing; and, in driving them, they went into the grounds of C. which had no hedge to divide them

them from the contiguous ground of A. and the dog pursued them on the grounds of C. — A. as soon as the sheep were off his own ground, called in the dog and chid him. The owner of the sheep brought an action of trespass for *chasing* the sheep. But the court was of opinion that *trespass* lay not in this case, holding it to be an *involuntary* trespass; whereas a trespass that may not be justified ought to be *voluntary*. The nature of a dog is such that he could not be recalled and withdrawn suddenly and in an instant. — And, by parity of reason, the man, into whose grounds the sheep were pursued by the dog, could not have maintained an action of trespass for breaking his close on this evidence. 2 *Gilb. Evid.* 514.

Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; but, when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. *All. 27: 8 T. Rep.* 267.

Necessity is of *three* sorts: necessity of conservation of life, necessity of obedience, and necessity of the act of God or a stranger.

And, *first*, of the conservation of life. — It was anciently held to be no felony or larceny for a man to steal victuals to satisfy his hunger. *Britton*, c. 10: *Mirror*, c. 4. But this doctrine is now exploded. 1 *Hawk. P. C.* c. 33, sect. 10.

So, if divers be in danger of drowning by the casting away of a boat, and one of them get to some plank, or on the boat's side, to keep himself above water, and another, to save his life, thrusts him from it, by which he is drowned, this is neither *se defendendo*, nor by misadventure, but justifiable. 1 *Hawk. P. C.* c. 28, sect. 26.

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The *second* necessity is of obedience. — Therefore, where husband and wife commit felony, the wife can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes to her husband. But this rule does not extend to the relation of master and servant.

Obedience to the laws in being is a sufficient excuse before the municipal tribunal, however it may be *in foro conscientiae*. The sheriff, who burned *Latimer* and *Ridley*, in the days of *Queen Mary*, was not liable to punishment from *Elizabeth* for executing so horrid an office, being justified by the commands of the then-existing magistracy.

So, where a man by commandment of the law is bound to arrest another for a capital offence, or disperse a riot, and resistance is made to his authority, it is here justifiable and even necessary to beat, wound, or perhaps to kill, the offender, rather than permit the offender to escape or the riot to continue. 1 *Hal. P. C.* 53: 4 *Black. Com.* 27, 31. In this case, the will cannot be said to exert itself freely, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less.

The *third* necessity is the act of God or of a stranger. — As if I am a tenant for years of a house, and it be overthrown by tempest or floods, or invasion of enemies; in these cases, I am excused in an action of waste. *Bac. Elem.* 26, 27.

Yet on this subject of *necessity* it is to be observed, that it is a privilege only as to private rights; for, in all cases, if the act, that should deliver a man out of the necessity, be against the state, necessity is no excuse; for, *a privilege is not good against the state*: and another maxim says, that *public necessity is greater than private*. Thus, in the case before put of husband and wife, the wife shall be excused in a case of felony, but not in case of treason, that being against the *commonwealth*. *Bac. Elem.* 27.

NE EXEAT REGNO.

If a debtor is going abroad, he may be prevented by this writ: to obtain which, the creditor must swear that the defendant is going out of the kingdom; which, if he should do, the debt may be lost. And this affidavit is made the ground of a motion in the Court of Chancery, whence the writ issues, and the debtor is compelled to give security, before a master in Chancery, to abide the order of the court, before the court will discharge the writ. 4 *N. Abr.* 169: 1 *P. Wms.* 263: 7 *Mod.* 9: *Pre. Ch.* 171. But a bill must be first filed. And it will not be granted where the demand is entirely at law; for, there the plaintiff has bail. 3 *P. Wms.* 313.

The court is best satisfied if the affidavit state the reasons upon which the party founds his oath; for, if the suggestion do not arise from some act or declaration of the defendant, it must be merely imaginary. *Per Buller, Sitting for Lord Lough. Mich. Term, 1799.*

NEGLIGENCE or NEGLECT.—See *Act*, and *Bailment*.

Damages are recoverable for negligent unskilful management of a man's business. And bad practice, whether it be for curiosity or experiment, or by neglect, is a great misdemeanor and offence at the common law. 1 *L. Raym.* 214.

If a party undertake to perform work, and proceed on the employment, he makes himself liable for any mismanagement in the course of that work; but, if he undertake and do not proceed on the work, no action will lie for the not doing of it. 5 *T. Rep.* 643.

If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there

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is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook *gratis* to attend a sick person, because his situation implies skill in surgery; but, if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper medicines to the best of his ability, such person is not liable to an action. 5 *T. Rep.* 643.

An action may be maintained against the landlord of a house for an injury done to a stranger through a neglect of repairs, which he, and not the tenant, is bound to repair. 2 *H. Black.* 350. But, unless it can be shewn that the landlord is liable, the action can only be brought against the occupier. 4 *T. Rep.* 318.

But an action will not lie by an individual against the inhabitants of a place, who may be bound to repair a common highway, for a consequential damage sustained from their neglect to repair. 2 *T. Rep.* 667.

NIGHT-WALKERS.

These are such persons as sleep by day and walk by night, being oftentimes pilferers, or disturbers of the peace. By *Stat.* 5 *Edw. III.* c. 14, constables are authorized by the common law to arrest night-walkers and suspicious persons, &c. Watchmen may also arrest night-walkers, and hold them until the morning. 2 *Hal. P. C.* 88, 96.

One may be bound to good behaviour for being a night-walker; and common night-walkers and haunters of bawdy-houses are indictable. *Latch.* 173: *Poph.* 280. But it is held not lawful for a constable, &c. to take up any woman as a night-walker on bare suspicion only of her being of ill fame; unless she be guilty of a breach of the peace, or some unlawful act, and found misdoing. *Holt's Manuscript.* See 2 *H. H.* 89.

NOTARIAL

NOTARIAL ACT.

The stamp for a protest, or notarial act, 4s.

A notary publicly attests deeds and writings to make them authentic in another country.

NOTES OF HAND. — See *Bills of Exchange*.

A promissory-note is an engagement in writing, whereby a person undertakes to pay to another, or his order, or to bearer, a certain sum of money. These instruments were rendered negotiable, and put on the same footing with inland bills of exchange, by the *Stat. 3 and 4 Anne, c. 9*, which enacts, that promissory-notes, payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on an inland bill of exchange.

A promissory-note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is indorsed, the resemblance begins; for, then it is an order by the indorser to the maker of the note, who, by his promise, is his debtor, to pay the money to the indorsee. The indorser of the note corresponds to the drawer of the bill; the maker to the drawer or acceptor; and the indorsee to the payee. When this point of resemblance is once fixed, the law is fully settled to be the same in bills and notes; and, whenever the law is reported to be settled with respect to the acceptor of a bill, it is to be considered as applicable to the drawer (or maker) of a note: when with respect to the drawer of a bill, then to the first indorser of a note. The subsequent indorsers and indorsees bear an exact resemblance to each other. *2 Burr. 676.*

£20.

London, Jan. 1, 1793.

On demand, I promise to pay to A. B. or bearer, twenty pounds for value received.

E. L.

A a 2

£140.

£140.

London, Dec. 2, 1798.

Two months after date, we and each of us promise to pay to Mr. C. L. or order, one hundred and forty pounds value received.

R. S.

S. J.

Bills of exchange and promissory-notes, unless the contrary be shewn by the defendant, are presumed to have been made on good consideration. The words *value received* are not material.

A promissory-note need not be protested. But three days grace are allowed on promissory-notes as well as on bills.

4 T. Rep. 151.

A promissory-note without consideration is, as between the parties to it, a piece of blank paper, but ceases to be so when negotiated. 1 Powell, 341.

Promissory-notes, payable to *bearer*, are equally transferrable as those which are payable to order; and the transfer in both cases entitles the fair and lawful holder to an action. Notes payable to order are transferrable by indorsement: those payable to bearer, by delivery. 1 Black. Rep. 485.

Where two join in a note, care should be taken that it be made jointly and severally. If it be made *jointly only*, you must sue both together, which may be very inconvenient; and, if *severally only*, it will require two stamps.

Notes made upon *condition* are useless; as, "if he proceed with the ship Triton to Africa;" for, no action will lie upon them, inasmuch as they are not negotiable within the statute. It has been determined, that a conditional note, where it would be necessary for the party to aver some collateral fact in order to entitle him to the money, is not a note within the statute. And, wherever such notes have been inadvertently or ignorantly accepted, it is best to declare on the promise, and give the notes in evidence. 4 Mod. 422: Str. 1151.

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"I. O. U. ten pounds" is evidence of a debt without a stamp. 1 *Espin. Rep.* 426.

By the *Stat.* 15 Geo. III. c. 51, all negotiable notes, &c. for less than 20s. are void, and the person publishing or uttering such notes shall forfeit not more than £20, nor less than £5.

By the *Stat.* 17 Geo. III. c. 30, all notes and bills of exchange, negotiable for 20s. or above, and less than £5, shall specify the names and places of abode of the payee, and shall be dated before or when drawn, and shall be payable twenty-one days after date, and not negotiable after the day of payment. And every indorsement shall be before the day of payment, and be dated at or before making thereof, and shall specify the name and abode of the payee; and the signing such note and indorsement shall be attested by a witness, or be void: and the party shall forfeit not more than £20, nor less than £5. But, *Note*, the above statutes do not specify any perfect mode for recovery of the penalties.

A note of hand under the statute should be to the following effect:

Blackburn, 21 June, 1799.

Twenty-one days after date, I promise to pay to Mr. John Jones, of Liverpool, in the county of Lancaster, the sum of three pounds ten shillings, value received, by

Abraham Staines,

Witness, *Samuel Jordan.*

And the indorsement, when paid away as cash, should be to the following effect:

29 June, 1799.

Pay the contents to Robert Hayes, of Middlewich, in the county of Chester, or his order.

John Jones.

Witness, *John Poole.*

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By 31 Geo. III. c. 25, for every promissory or other note for payment of money to the bearer on demand, which may be re-issuable after payment, at the place where the same was first issued, but not otherwise, where the sum amounts to 40*s.* and does not exceed £5:5, there shall be a stamp-duty of 3*d.*; and, by 37 Geo. III. c. 90, 1*d.*; total 4*d.*

Above £5:5, and not exceeding £30, — 6*d.* and 2*d.*; total 8*d.*

Above £30, and not exceeding £50, — 9*d.* and 3*d.*; total, 1*s.*

Above £100, and not exceeding £200, — 1*s.* 6*d.* and 6*d.*; total, 2*s.*

Where these promissory-notes shall be paid by the person by whom made or signed and first issued, and at the place where first issued, such person, notwithstanding such payment, may, at any time afterwards, and so often as there shall be occasion after every such payment thereof, but not otherwise, again issue and negotiate such notes. And every such note is declared to be after payment, but not otherwise, issuable and negotiable. But, if paid by any other than the maker, or at any other place than the place of issuing, it shall be construed to be satisfied, and shall be no longer negotiable, but cancelled. And if any person shall again issue any such note, after payment by any such other person, or at any other place, or if any person, named in such note for payment thereof, shall, after payment, neglect or refuse to cancel it, such person shall forfeit £20. And, if such note shall not be cancelled, then, and as often as it shall be again issued, it shall be chargeable with the like duty as was first charged thereon, to be paid by the person who shall again issue it. *Sec. 7.*

For any promissory or other note payable to the bearer on demand, which may be re-issued after payment of the same, at the same or any other place than where first issued, where it shall amount to 40*s.* and not exceeding £5:5,

a stamp-duty of 6*d.*; and, by 37 Geo. III. 2*d.*; total 8*d.* is imposed.

Above £5: 5, and not exceeding £30, — 1*s.* and 4*d.*; total, 1*s.* 4*d.*

It is declared that these notes may, as often as occasion shall require, be again issued by the person making the same, notwithstanding such notes have been paid by the person making, or any other person, in pursuance of any appointment for the payment thereof.

For every promissory or other note, payable otherwise than to bearer on demand, where the amount is 40*s.* and not exceeding £30, — 6*d.* and 2*d.*; total, 8*d.*

Above £30, and not exceeding £50, — 9*d.* and 3*d.*; total, 1*s.*

Above £50, and not exceeding £100, — 1*s.* and 4*d.*; total, 1*s.* 4*d.*

Above £100, and not exceeding £200, — 1*s.* 6*d.* and 6*d.*; total 2*s.*

If payable on demand or otherwise, and exceeding £200, — 2*s.* and 8*d.*; total, 2*s.* 8*d.*

Every promissory or other note, payable to the bearer on demand, which shall be issued after payment, under 31 Geo. III. shall notwithstanding be payable to the person holding the same, and such person may maintain an action thereupon. *Sec.* 9.

Notes on *unstamped* paper can never be stamped on any pretence whatever. *Sec.* 19. But any bill or note, made after July 20, 1797, which shall be stamped with an improper stamp, but of equal or superior value to the stamp required, may be stamped, if produced before payable, on payment of the duty and 40*s.* penalty; if after payable, on payment of the duty and £10 penalty.

The new duties commenced the 5th of July, 1797, and no note, allowed by 31 Geo. III. to be issued again, shall,

after the 5th of July, 1797, be so issued, until properly stamped with the new stamps.

As to the stamp-duty on small notes, the *Stat.* 39 Geo. III. c. 107, after the 1st of December, 1799, imposes a duty of 2*d.* on every bill, note, order, or draft, whether payable on demand or otherwise, where the sum is for £1 or £1 : 1 ; and of one halfpenny when for 5*s.*

And 2*d.* on every promissory or other note, payable to bearer on demand only at the place where issued, and which may be re-issuable after payment at that place, where for £1 or £1 : 1 ; and one halfpenny when for 5*s.*

And 4*d.* on every promissory or other note, payable to the bearer on demand at two or more different places, or at any place different from that where it shall originally issue, and which may be re-issued after payment at the same or any other place, where for £1 or £1 : 1 ; and one penny when for 5*s.**

The duty is payable by the giver of the note.

Drafts, payable on demand upon a banker, residing within ten miles of the drawer, are not liable to the duty.

No *bill of exchange* shall be re-issued. But *notes* payable on demand, on which a duty of 2*d.* or one halfpenny is imposed, paid by persons giving them at the places where first issued, may be re-issued ; but, if paid by any other persons, or at any other place, in pursuance of appointment expressed therein, shall be cancelled : and, if re-issued, the party shall forfeit £20. And such notes, not cancelled, but issued again, shall pay the same duty as when first issued.

Notes, stamped with the duty of 4*d.* and 1*d.* respectively, may be re-issued, though paid by other persons than by whom, and at other places than where, first issued. And notes so issuable shall be the property of persons holding them.

* The 5*s.* notes are only issuable in Scotland.

NOTICE. — See *Act, Landlords and Tenants, Tithes.*

Half a year's (not fix calendar-month's) notice must be given to quit, under a holding from year to year. 3 *Wilf.* 21: 1 *T. Rep.* 159: 2 *Black. Rep.* 1224. And it must expire at the end of the year. 1 *T. Rep.* 159.

But, if a house or lodgings be taken for any time certain, no notice to quit is necessary; and, where no particular notice is mentioned, the notice should be governed by the taking; so that on a taking by the month, a month's notice is sufficient. 1 *Espin. Rep.* 94. But the reservation of the rent quarterly does not dispense with the necessity of six months notice to quit. 1 *Espin. Rep.* 266.

A parole notice to quit is sufficient on a parole demise.

Notice to quit *at the end of the current year of the tenant's holding* is sufficient, though no time be mentioned. 2 *Espin. Rep.* 589.

By the custom of London, a tenant under 40s. yearly rent is entitled to a quarter's notice only to quit; but, when above that rent, half a year. *Skinner*, 649.

It appears that a mortgagee may recover in ejectment without notice to quit, against a tenant that claims under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. *Doug.* 21.

Where a tenant, on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and a regular notice to quit on that day is given, he shall be bound by the information he so gave, and not be permitted to shew that in fact it began at a different time. 2 *Espin. Rep.* 635.

Michaelmas is old Michaelmas, if the custom and understanding of the county authorizes it. 1 *Espin. Rep.* 199.

A distress for rent, after the expiration of a notice to quit, is an unequivocal waiver of the notice. But a mere receipt

receipt of rent after must be left to the jury. *Black. Rep.* 311; 1 *T. Rep.* 161, n.: 6 *T. Rep.* 219.

Where a tenant has a lease for a term certain, and holds over after the expiration of it, it is not necessary for the landlord to give notice to quit, to recover possession by ejectment. 1 *T. Rep.* 54, 162.

But if the landlord afterward receives rent, or does any act by which he manifests his assent to the continuance of the tenure, this turns the estate at sufferance into a tenancy from year to year.

The notice by 4 Geo. II. c. 28, may be given previous to the end of the term. *Black. Rep.* 1075. But, Q. whether it may not be given afterwards, though the double value could only be recovered from the delivery of the notice and demand of possession? The double value may be recovered, though it is not mentioned in the notice to quit. 1 *T. Rep.* 53. The notice by the landlord must be in writing; but that by the tenant, under 11 Geo. II. c. 19, may be by parole. 3 *Burr.* 1603. The double value can only be recovered by action of debt; but the double rent may be recovered by distress or otherwise, like single rent. 1 *Black. Rep.* 535. No length of time is necessary to the validity of these notices under the statutes to entitle the landlord to double value. 2 *Black. Com.* 151, n. See RENT.

If the tenant hold over after the expiration of his term, or after the end of the year, when he has had a proper notice to quit, the landlord may turn his cattle upon the premises, but without force; and the cattle cannot be distrained as damage feasant by the tenant. 7 *T. Rep.* 431.

Where a part of the premises was entered upon at Candlemas and part at May Day, but the rent was payable at Lady-day, it was held, that half a year's notice to quit at Lady-day was sufficient for the whole. 2 *Black. Rep.* 1224.

If

If notice to quit at Midsummer be given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice on the trial, though he made no objection to it at the time it was served, but merely said, "I pay rent enough already, and it is hard to use me thus."

4 *T. Rep.* 361.

Where the tenant of an estate holden by the year has his dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house is strong presumptive evidence that the master received the notice, and ought to be left to the jury. *Id.* 464.

The time specified in the notice will be supposed to be the end of the year, unless the contrary is shewn.

The defect of a notice cannot be set up by a tenant, who controverts the title of the landlord.

If A. B. lets a house to C. D. who lets it to E. F. notice to quit must be given to C. D. against whom the ejectment must be brought to recover possession; but the ejectment must be served on E. F.

Generally speaking, where it is required by law that notice shall be given to a party before he shall be affected by an act, leaving it at his dwelling-house is sufficient: but it is otherwise in the case of process to bring a party into contempt; there, personal notice is necessary.

4 *T. Rep.* 465.

NUDUM PACTUM. — See *Contracts*.

Where a promise is made by a bankrupt after the bankruptcy to revive a debt due before, in consideration of the creditor's agreeing to take no dividend, an action will lie on the new promise. *Cowp.* 544.

NUISANCE.

If a nuisance affects one person only, an action will lie, in which damages may be recovered; if many, either an
action

action or indictment. 5 *Rep.* 73: 1 *Inst.* 56: 1 *Vent.* 208. Nuisances must be removed without riot; and so much of a thing only as causes the nuisance is to be removed. 5 *Rep.* 101: 9 *Rep.* 55.

It has been holden, that it is no common nuisance to make candles in a town: but this opinion is much doubted; for, it seems agreed, that a brewhouse, erected in such an inconvenient situation, that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted for a common nuisance. And so may a glass-house or swine-yard. The rule of law is, *sic utere tuo ut alienum non laedas*, so use your own as not to injure another. *Hutt.* 135: 2 *Roll. Abr.* 140: 1 *Lutw.* 99: *Cro. Car.* 367: 2 *Roll. Abr.* 140.

It does not seem necessary to constitute the offence that the smell should be *unwholesome*, it is enough if it render the enjoyment of life and property *uncomfortable*. 2 *Toml. Dist. v. Nuisance*, col. 4.

If one sees his neighbour erecting a nuisance, he cannot remove it till it becomes an actual nuisance. 12 *Mod.* 510.

If one does any act, in itself unlawful, which tends necessarily to the damage of another's property, it is a nuisance, and actionable; and it is incumbent on him to find some other place to do that act in, where it will be less offensive. 3 *Black. Com.* 217.

For any obstruction to a public highway, which is a *public nuisance*, although it should obstruct the party's business, an action cannot be maintained by the party aggrieved; the remedy is by indictment only. 1 *Espin. Rep.* 148.

Where a vessel has been sunk in a navigable river by accident or misfortune, an indictment will not lie for a nuisance in not removing it. 2 *Espin. Rep.* 675. *Sed vide* 2 *Lill.* 244.

It has been holden to be a common nuisance to make great noises in the night with a speaking-trumpet. *Str.* 704.

To

To permit a house near the highway to be in a ruinous condition. *Salk.* 357. Or to lay timber in a public river, although the soil on which it is laid belong to the party, if it obstructs the necessary intercourse. *Str.* 1247. Or to manufacture acid spirit of sulphur, vitriol, or aqua fortis, in the vicinity of houses. 1. *Burr.* 333.

NURSERYMEN. — See *Gardens.*

OATH.

It seems to have been held formerly, that, where a demand was disputed, and the party demanding promised to pay if the other would swear before a magistrate that it was due, and it was sworn accordingly, that this was a good consideration to support an action. See *Mod.* 166, *Anne and Andrews.*

OCCUPANT.

In some cases, where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea, or in a river, or by the *alluvion* or *dereliction* of the waters; in these instances, the law of *England* assigns them an immediate owner. For *Bracton* says, if an island arise in the *middle* of a river, it belongs in common to those who have lands on each side thereof; but, if it be nearer to one land than another, it belongs only to him who is proprietor of the nearest shore. *Bract.* l. ii. c. 2. Yet it seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for, if the whole soil is the freehold of any one man, as it usually is, wherever a several fishery is claimed, then it seems just (and so is the constant practice) that the eyots, or little islands, arising in any part of the

the river, shall be the property of him that owneth the fishery and soil. *Salk.* 637.

However, in case a new island arises in the sea, though the civil law gave it to the occupant, yet ours gives it to the king. *Bract.* l. ii. c. 2: *Callis of Sewers*, 22. And as to lands gained from the sea, either by *alluvion*, by the washing up of the sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases, the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. 2 *Roll. Abr.* 170: *Dier*, 326. For, *de minimis non curat lex*; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out; this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the *alluvion* or *dereliction* be sudden and considerable, in this case, it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. *Callis*, 24, 28. So that the quantity of ground gained, and the time during which it is being gained, are what make it either the king's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gained upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but, if the course of the river be changed by a sudden and violent flood, and other hasty means, and thereby a man loses his ground, it is said he shall have what the river has left in any other place, as the recompense for this sudden loss. *Callis*, 28.

OFFICES, SALE OF.

The *Stat.* 5 and 6 *Edw. VI.* c. 16, declares all securities given for the sale of offices unlawful. And, if any person shall

shall bargain or sell, or take any reward, or promise of reward, for any office, or the deputation of any office, concerning the revenue, or the keeping of the king's castles, or the administration or execution of justice, unless it be such an office as had been usually granted by the justices of the King's Bench or Common Pleas, or by justices of assize; every such person shall not only forfeit his right to such office, or to the nomination thereof, but the person giving such reward, &c. shall be disabled to hold such office.

The plaintiff procured for his brother (defendant's testator) a place in the Excise, by his interest with the commissioners, and the testator gave him a bond conditioned for the payment of £10 a year during his life: he died, having omitted payment for some years before his death; and the plaintiff having put the bond in suit, equity relieved the defendant against it, as occasioning extortion, corruption, and the sale of offices. 3 *P. Wms.* 391. See also 2 *Wils.* 133.

But it has been decided, that, where an office is within the statute, and the salary certain, if the principal makes a deputy, reserving by bond a less sum out of the salary, it is good; or if the profits are uncertain, reserving a part, (as half the profits,) it is good; for, the fees still belong to the principal, in whose name they must be sued for. *Salk.* 466. But, where a person so appointed gives a bond to the principal to pay him a sum certain, without reference to the profits, this is void under the statute. *Salk.* 465.

To offer money to an officer of state, to procure the reversion of an office in the gift of the crown, is a misdemeanor at common law, and punishable by information; and even the attempt to induce him under the influence of a bribe is criminal, though never carried into execution. 4 *Burr.* 2494: *K. v. Vaughan.*

Any

Any contract to procure the nomination to an office not within the *Stat. 6 Edw. VI.* is defective on the ground of public policy; and the money agreed to be given is not recoverable. 1 *Bro. Chanc. Rep.* 124.

OMNIUM.

When a loan to government is simply a certain sum lent at any fixed rate of interest, it is evident the gain of the subscribers must entirely depend upon the market-price of stock, bearing the same interest, being higher when they may have occasion to dispose of their new stock than the price at which they made their agreement with the minister; but of late years the terms of the loans have generally consisted of several distinct articles; as of 3 or 4 per Cent. Consols, Long Annuities, and lottery-tickets. And the term *Omnium* includes all the several articles in the contract between government and the original subscribers; e. g. £1000 *Omnium*, of the year 1795, contained,

£.	s.	d.	
750	0	0	3 per Cent. Consols.
250	0	0	4 per Cent. Consols.
3	3	9	Long Annuity.
159	14	5½	Imperial 3 per Cents.
9	11	8	Imperial Annuity.
0	7	6	Additional Long Annuity.

FAIRMAN.

OPTION.

When one of two things is to be performed, the option is in the person who is to perform. *Doug.* 14, 15.

ORDNANCE-DEBENTURES.

These bills are issued by the Board of Ordnance to persons contracting for stores, &c. purchased in that department;

partment; and, as they are not payable at any fixed period, and do not bear interest, there is always a discount upon them, which has sometimes been very considerable. Although these bills are not originally entitled to any interest, it was thought proper to allow the proprietors of those funded in 1784 and 1785 to add interest to them, at 4 per cent. after the expiration of fifteen months from the respective dates of the bills. *Fairman*, 92.

PARDON.

There are three ways by which accomplices obtain a right to a pardon. 1. By approvement. 2. By coming within the *Stat.* 10 and 11 W. III. c. 20, sect. 5. 3. By being entitled to it by the royal proclamation. *Cowp.* 331.

An accomplice, though not within any of the three foregoing cases, may, if admitted a witness under the practice allowed, if he behaves fairly and discloses the whole truth, obtain a recommendation to mercy. But a justice of peace has no authority to select whom he pleases, and to tell such offender he shall be a witness. *Ibid.*

PARENT AND CHILD.

A parent may justify an assault in defence of his child, and may have the benefit of his children's labour while they live with him and are maintained by him. He has no power over his child's estate but as his trustee or guardian, and must account for the rents when he comes of age. 1 *Black. Com.* 453.

The claims of a child, who makes earnings, and lives with the parent, who has regularly performed the duty of maintenance, is a question on which there have been difficulties; chiefly perhaps from the general principle strongly tending one way, while the sentiments of humanity and compassion seemed to establish a ground of equity on the other hand. *Gilb. Evid.* 939: 2 *Vez.* 675.

In the case here referred to, the father became a bankrupt, and the Court of Chancery let in the child as a creditor for money it had earned, and which had been received by the father; although the child had, during the time, dwelt with the father, and was maintained at his expense.

A father may maintain an action of trespass for breaking, &c. his house, and debauching his daughter, by which he lost her service, though the daughter be above twenty-one years of age, where acts of service are proved, though there be no contract for service. 2 *T. Rep.* 166. See SEDUCTION.

And an action will lie at the suit of the father for beating the son, whereby the father lost his service; and it need only be proved in such action, that the son lived in the house of the father, and was part of his family. 1 *Esplin. Rep.* 217.

PAROLE. — See *Contracts*.

A parole demise for five years is not a good lease for three years by the Statute of Frauds and Perjuries, for such a demise will only operate as a lease or tenancy at will by the express words of that statute. 4 *T. Rep.* 680. By the statute above-mentioned, a lease for more than three years must be in writing. 29 *Car. II. c. 3*. And a lease not exceeding three years, in which the rent reserved amounts to two-thirds of the improved value, is good without writing; but all other parole leases or agreements for any interest in lands have the effect of estates at will only. *Bull. N. P.* 279.

PARTNERS.

Partners or copartners are persons who enter into trade or business jointly, and to partake in such proportions as are agreed upon of the profits and losses.

The

The true criterion of partners is that they share in all risks of *profit* and *loss*. 2 *Black.* 998: 1 *H. Black.* 48: *Doug.* 556.

A partnership may exist in a particular concern or business, and bind the parties to matters only connected with it. 1 *Espin. Rep.* 29.

Persons, who jointly undertake any *single* concern, are not considered in the eye of the law as *general* copartners, so as to be subject to a joint commission of bankruptcy. *Doug.* 556.

A. B. C. and D. entered into an agreement to purchase goods in the name of A. only, and to take aliquot parts of the purchase; but it did not appear that they were *jointly to resell* the goods. On the failure of A. the ostensible buyer, B. C. and D. were held not answerable to the seller as partners. 1 *H. Black.* 37, 44.

A man who advances money to a trader, and becomes thereby interested in the profits of the trade, oftentimes makes himself a secret partner, though it does not in all cases conclude him so. And Mr. Justice *Blackstone* says, that the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is *certain* and *definite*, or *casual*, *indefinite*, and depending on the accidents of trade: in the former case it is a loan; in the latter, a partnership. 2 *Black. Rep.* 998, 999.

The law is clear, that dormant partners, when discovered, are liable to debts. *Doug.* 371.

Each partner has the entire possession of every part as well as the whole, each having an undivided moiety of the whole, and not the whole of an undivided moiety. They are joint tenants in the stock, not only of that which was in being at the time of entering into the partnership, but they continue joint tenants throughout, whatever changes may take place. 1 *Vez.* 242: *Cowp.* 448. And, being seized *per my et per tout*, (by the half and by the whole,) each

is entitled to be allowed against the other any thing he has advanced, and to charge the other in account with what that other has not brought in, or has taken out, more than he ought. *Cowp.* 471 : 1 *Vez.* 244 : *Pre. Chanc.* 285.

Where three had employed the defendant to sell timber, in which they were jointly concerned : two of them he had paid their exact proportion, and they had given him a receipt in full of all demands : the third brought an action for the remainder, being his share ; and it was objected, as this was a joint employment by three, one alone could not bring the action ; but it was ruled by *Lord Mansfield*, that where there had been a severance, as in this case, one alone might sue. *Espin. Dig.* 117.

The rule of law with respect to partners is, that, upon the death of one, the partnership-property vests in the survivor, as a trustee for, and subject to an account with, the representatives of the deceased partner for his share ; from which principle it follows, as of course, that the executor of the deceased partner cannot collect the partnership-debts, or commence an action for the recovery thereof. No one but the surviving partner can enforce the payment of the partnership-debts, nor will any of the partnership-debtors be justified in payment of the debts to any one but him and such persons as he shall appoint. On this principle the accounts must be taken, and nothing can be considered as the share of the survivor till that is done, because of the continuance of the property in the stock of the representative of the deceased partner, who has a specific lien thereon, although the survivor afterwards dies or becomes bankrupt.

And, if the partnership is dissolved by consent, that does not determine the legal interest, which continues as before ; so that the property of the stock of the partner going out is not divested thereby, but he remains equally entitled as joint tenant with the other ; and, in a bill for an account,
the

the stock would be subjected for his satisfaction. And as, between one partner and the separate creditors of the other, they cannot affect the stock any farther than that partner could whose creditors they are. 1 *Vez.* 242.

But there are exceptions to this rule, particularly in the case of farmers; for, the executor^{or} administrator of a farmer, being bound to perform the¹ conditions of the lease to the lessor, and having the right to manage the farm or to cause it to be managed for his advantage, this right and this engagement distinguish his condition from that of the executors and administrators of partners in other concerns; inasmuch as he cannot be excluded from reaping his share of the benefit of the farm, even although the partners had not begun to manage it before the death of the partner to whom he succeeds. *Wais.* 437.

Where a partnership expires by *effluxion of time*, one intending to continue the trade, and the other will not, an action at law may be brought, or bill in equity filed, for an account, and to restrain the disposing of the goods, the possession of which may be wrongfully withheld.

The right in law and justice, which one partner has against another after a dissolution of partnership, clearly is not to change the possession, or to make an actual division of specific effects; for, one partner may be a creditor of the partnership to ten times the value of all the effects. The other partner, in that case, can only have a right to an account of the partnership, and to the balance, if any, due to him on that account; and no person deriving under a partner can be in a better condition than himself. His executor stands in the very same light: so the assignees under a commission of bankruptcy against one partner must be in the same state. They can only be tenants in common of an undivided moiety, subject to the rights of the other partner. *Cowp.* 448, 471: 12 *Mod.* 446, 7.

If partners dissolve their partnership, they who deal with either, without notice of such dissolution, have a right against both. *Cowp.* 449.

If, on an execution against a partner, the partnership-goods are taken and sold, the sheriff is to pay over to the other a share of the produce proportioned to his share in the partnership-effects, to be settled on a reference to the master. *Doug.* 627, 650.

On an execution against one partner, the sheriff must seize all the goods; for, the moieties are undivided; and, if he seize but a moiety, and sell that, the other copartner will have a right to the moiety of that moiety. Therefore he must seize the whole, and sell the moiety thereof, and then the vendee will be tenant in common. 1 *Salk.* 392: 3 *Salk.* 61: 2 *L. Raym.* 871: *Doug.* 627.

If a creditor of one partner takes out execution against the partnership-effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner. *Cowp.* 449.

Where the partnership-effects are sold, the proportion may be settled by a reference to the master. *Doug.* 627.

Where one partner commits an act of bankruptcy and the other not, a commission will go against the one, for he owes the debt. *Watf.* 416.

Partnerships are dissolved by bankruptcy, by an execution, and by agreement. *Cowp.* 449: 4 *Burr.* 2176.

One partner may sustain an action for money had and received against the other partner, for money received to the separate use of the former, and wrongfully carried to the partnership-account. 2 *T. Rep.* 476.

If one partner orders goods, without disclosing the names of the other partners and the goods be afterwards delivered to them all, they are all liable, because the delivery and the sale make one entire contract, and the delivery is supposed
to

to be according to the sale. *MS. Bull. Trin.* 32 Geo. III.
Saville v. Robinson and another.

Several, on entering into partnership, borrow money of several persons to carry on their joint trade, the lenders cannot maintain actions against all the partners. *Id.*

Money lent to one partner for his own expenses, while engaged in the partnership-business, shall be deemed a partnership-debt. 1 *Espin. Rep.* 406.

Where one partner takes out more money from the partnership-stock than his share amounts unto, it was formerly held that the partnership-creditor had a right to come upon the separate estate of that partner for so much. 1 *Atk.* 225. But the rule seems to be now settled, that this cannot be done, unless it can be shewn that the partner acted fraudulently, with a view to benefit his separate creditors at the expense of the joint creditors. 1 *Cooke's B. L.* 547.

Where a balance of accounts is struck between partners, on the dissolution of their partnership, and there is a promise to pay, an action at law will lie. 2 *T. Rep.* 438.

A bond-creditor, where partners are jointly and severally bound, may, under a bankruptcy, make his election to come against the joint or separate estate; but not against both, except for the deficiency, and after the other creditors are paid. 1 *Atk.* 107: 2 *Chan. Cas.* 139.

Where a bill or note is drawn in favour of two or more in partnership with one another, an indorsement by one will bind both, if the instrument concern their joint trade; so, where it is in favour of them, or either of them, an indorsement by one is a sufficient transfer, though they be not in partnership. *Watf.* 54: *Kyd*, 68.

So one of two joint traders may accept a bill drawn on both, if it concerns the joint trade; but otherwise, if it concerns the acceptor only, in a distinct interest and respect. 1 *Salk.* 126.

So, where a bill is drawn by two, made payable to them or their order, it would seem from principle that either might transfer without the other; for, when two persons join in the same bill, they hold themselves out to the world as partners, and for that purpose are to be treated as such. *Watf.* 54: *Doug.* 630.

But, where one partner puts the name of the firm on a bill, but the party, at whose request it is done, and who receives the bill, knows that it is not on the partnership-account, nor for their benefit, he shall not be allowed to recover against the firm. 2 *Espin. Rep.* 524.

In a general partnership, payment to one party is payment to all. 12 *Mod.* 447.

So, if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportion. 5 *Vin. Abr.* 16, 245.

And, if there be four partners, whereof three are bankrupts, and their shares assigned, and a payment be made to him who is no bankrupt, it is a payment to all the assignees; for, now they are all partners. 12 *Mod.* 447.

If one partner borrows any money out of the general partnership-trade, his own share shall be answerable for it; and he shall not be permitted to come into equity and pray an account, without making a satisfaction for the debt, *Watf.* 72.

If a partner, who takes the same care of the common affairs of the partnership as he does of his own, should fall into some slight fault, without any evil intention, he is not answerable; a partner never being considered as responsible for any accident, unless occasioned by some fault, for which he ought to be answerable. It has been made a question, whether a partner, like a bailee, is accountable for fraud only, or whether he is also accountable for his negligence in carrying on trade; and it now prevails that he is answerable for all the damages which happen through his fault. *Watf.* 152.

But,

But, if a man fails in having used the most exact diligence, such a failure is not comprehended under the term *culpa*, or *fault*; for, a partner is not liable to answer damages, if, in regard to the goods of the partnership, it appears that he has used the same care and diligence towards them which he has usually observed in keeping his own individual property. *Ibid.*

In carrying on a partnership-trade, the powers of each partner are in general discretionary; but, at the same time, partners ought not to act in matters of importance, without consulting together, provided opportunity offers; for, though a partner is only bound to take the same care as of his own, and may not be liable to make good any loss arising from his judging wrong, in a case where he had authority to act, yet, if it be made out that he exceeded his power, and the event prove unsuccessful, he must bear the loss. If it were otherwise, indiscreet partners might lead those with whom they were connected into the worst of difficulties against their consent. *Watf.* 154.

In partnership-concerns nothing can be considered as the exclusive right or actual share of one partner, but his proportion of the residue upon a balance of the accounts struck between them. *Cowp.* 471.

If one of several partners is concerned in smuggling, on account of the copartnership-trade, the crown may go against any one of the partners for the whole penalty. *Watf.* 256: *Bunb.* 298.

In all partnership-contracts, where money is furnished by one side only, if the casualty goes to the *interest* of such money only, and not to the *principal*, it is usury; and the lender is precluded from recovering any thing in an action at law founded upon such an usurious contract. But, at the same time, to make a contract usurious, there must be a loan of money, wares, merchandizes, or other commodities, to be repaid and restored to the lender with higher interest than

than the statute allows. It is essential that the thing *lent* is to be returned; for, it cannot be a *loan*, unless the money, or thing borrowed, is to be restored. The making illegal interest precarious, if the loan of the principal money or thing is to be restored, will not take it out of the statute; nor will any other shift or contrivance whatsoever. *Watf.* 295: 1 *T. Rep.* 200: 3 *Wilf.* 395.

If money be lent on a risk at more than legal interest, and the casualty affects the interest only, it is usury; for, the party is sure to have the principal again at all events. But, if the interest and principal are both in hazard, it is not then usury. As in the case where one went to *Newfoundland*, and another lent him £100 for a year to victual the ship; and, if he returned with the ship, he would have so many fish, and at such a rate, which exceeded the interest allowed by the statute; and, if he did not return, he would then lose his principal; it was adjudged to be no usury. *Ibid.*: *Cro. Jac.* 209.

And when there is a hazard that the party may have less than his interest, it is no usury. *Watf.* 297: *Show.* 8: *Comb.* 125 *S. C.*: *Carth.* 67, *S. C.*

And it is also established, that a loan at more than the legal interest is not usury, if, by the repayment of the principal, the borrower may avoid the interest. 5 *Co.* 69, *b.*

After a partnership is entered into, and begun to be carried on, the signature of each partner is usually sent to the correspondents; and so continues to be sent, as new correspondents arise. *Watf.* 153.

And, when a new partner is admitted, although there be no public notice of the alteration in the firm, his signature ought to be transmitted, with an intimation of the change in the copartnership, to all their correspondents. Nevertheless, mercantile houses that have been long established often retain the old firm, though all the original partners be dead or withdrawn. *Ibid.*

When

When a partnership is dissolved, it ought not only to be advertised in the Gazette, but in the provincial papers; and, besides this, notice should be given to the persons with whom the firm have dealt; and every other possible publicity given it, to prevent the one being afterwards injured by credit being given to the other. In the case of *Godfrey* against *Turnbull* and *Macauley*, *Trin.* 35 Geo. III. *Lord Kenyon* declared, that notice in the Gazette of dissolution of a partnership is sufficient notice to the world; *at least* as against those who have had no previous dealings with the firm. 1 *Espin. Rep.* 371.

For the encouragement of trade, there is no survivorship of a capital, or stock in trade, among merchants and traders; for, it is a maxim of law, *jus accrescendi inter mercatores, pro beneficio commercii, locum non habet*; (1 *Inst.* 182;) “for the benefit of commerce, there is no right of “survivorship among merchants.”

It would seem, that, if any of the legatees, or persons entitled to the effects of a deceased partner, should become injured in consequence of any indulgence granted by his executors or administrators to the surviving partner, the executors will become personally answerable to such legatees, or persons entitled, to the full amount of the injuries they may sustain. If, therefore, a surviving partner refuses to come to an immediate account, the executors should, without delay, file a bill in equity against the surviving partner, praying an account, and a receiver, and for general relief and protection. Executors, in such cases, may act prudently in advertising for debtors to bring in their accounts, &c.

If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership. 1 *Black. Rep.* 475.

A debt due to two partners may be set off by the survivor to an action brought against himself. 1 *Espin. Rep.* 47.

Money

Money lent to one partner for his own expenses, while engaged in the partnership-business, is a partnership-debt. 1 *Espin. Rep.* 406.

One partner cannot bind the other partners by deed, but he may by drawing or accepting bills of exchange. 7 *T. Rep.* 207, 210.

Where a partner has withdrawn his name from a firm, though he continues to receive part of the profits as a dormant partner, it is not ground of nonsuit that his name is not joined in an action against the other partners. 2 *Espin. Rep.* 468.

An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in *England*, knew nothing of the sale; for, the act of one is in this respect the act of all: and it is a contract by subjects of this country made in contravention of the laws. This case must be considered in the same light as if all the partners lived in *England*. 3 *T. Rep.* 454.

In actions against partners, all must be named; and, if any are omitted, those sued may plead in abatement: but, as they are bound in their plea to shew who their partners are, and as each party must pay their own costs, it is not often done. 5 *Burr.* 2611: 2 *Bl. Rep.* 695.

When some of the parties to a contract are out of the jurisdiction of the court, they must be joined in the action, and outlawed. 6 *T. Rep.* 327.

So, where there is a joint demand, and one will not join in the action, he must be summoned and severed. *Watf.* 357.

Where one partner is out of the kingdom, the partner before the court shall pay the whole of a joint demand, *Watf.* 356.

PART-OWNERS.

Part-owners are those who are joint owners in ships, &c. — Where there are part-owners of a ship, the majority may fit her out, without the consent of the rest. But, if they do, such majority run all hazards, and are to partake of the profits. *Show.* 13, 30.

Action lies as well against the part-owners of a ship, for the loss or spoiling of goods delivered to the master, as against the master; for, as a master of a ship is chargeable in respect of his wages, so are part-owners in respect of the freight. *Show.* 30, 105: 3 *Lev.* 259.

PARTY-WALLS.

The *Stat.* 14 Geo. III. c. 78, sect. 41, intended to throw the burden of party-walls on persons to whom long leases had been granted, with a view to an *improvement* of the estate, and who afterwards *underlet* at a considerable increase of rent. 3 *T. Rep.* 458.

That the owner of the *improved* rent, not of the *ground-rent*, is liable to pay the expenses of a party-wall. *See Id.* and 5 *T. Rep.* 130.

The lessor of a house at rack-rent (there being no other person entitled to *any* kind of rent) is liable to contribute to the expenses of a party-wall, under the *Stat.* 14 Geo. III.; though the lessee has improved the house demised. 8 *T. Rep.* 214.

PATENT.

A patent is void if the specification be ambiguous, or give directions which tend to mislead the public. 1 *T. Rep.* 602.

So, if the patentee say that, by one process, he can produce three things, and he fail in one of them. *Ibid.*

So,

So, if the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail. *Ibid.*

So, if the invention consists in an addition or improvement only, and the patent is for the whole machine, &c. *Bull. N. P.* 76.

The general questions on patents are, 1. Whether the invention were known and in use before the patent? 2. Whether the specification is sufficient to enable others to perform it? *Ibid.*

The meaning of the specification is, that others may be taught to do the thing for which the patent is granted, after the term is expired. *Ibid.*

If the patent is void, the patentee cannot enforce the performance of a covenant for the observance of the exclusive right, entered into by another, in contemplation of its being good. 3 *T. Rep.* 438.

PAWNING.

A pawnbroker must take out an annual license; for which, if within the bills of mortality, he shall pay £10; elsewhere, £5; or forfeit £50; and must have over his shop-door his name and the word PAWNBROKER, in legible characters, or forfeit £10 for every week. 25 Geo. III. c. 48: 29 Geo. III. c. 57. Confirmed by *Stat.* 31 Geo. III. c. 52: 33 Geo. III. c. 53: and 36 Geo. III. c. 81.

Rates of Interest. — For every pledge, on which is lent a sum not exceeding 2s. 6d. one halfpenny, for any time not exceeding one calendar-month, shall be paid; and the same for every month afterwards, including the current month in which such pledge shall be redeemed.

s.	d.	d.	£.	s.	d.	d.
If 5	: 0		1	0	: 15	: 0 3
7	: 6		1½	0	: 17	: 6 3½
10	: 0		2	1	: 0	: 0 4
12	: 6		2½			

and

and so on progressively, and in proportion for any sum not exceeding 40s.

When the money lent exceeds 40s. and does not exceed 42s. eight-pence; and, if exceeding 42s. and not exceeding £10, after the rate of 3d. for every 20s. per calendar-month; and so in proportion for any fractional sum.

Where any intermediate sum lent upon any pawn shall exceed 2s. 6d. and not 40s. the pawnbroker may take after the rate of 4d. for the loan of 20s. by the calendar-month, including the current month.

Provided that, on applying to redeem within seven days after the end of a month, it may be done without paying any thing by way of profit for the said seven days. And, after the expiration of the said seven days, and before the expiration of the first fourteen days of another month, they may be redeemed, on paying the profit for one month and a half; but, after fourteen days, the broker will be entitled to the whole second month; and so of every subsequent month.

The pawnbroker must also put up a table of rates in a conspicuous part of his shop, on forfeiture of £5; and must enter an account of goods pawned in a book; and give a note, containing a description of the goods pawned, and the money advanced, with the day of the month and year, and the names of the parties; and the name of the street and number of the house; and whether he is a lodger or the keeper of such house, by using the letter L. if a lodger, and the letters H. K. if a housekeeper; and also the name and abode of the owner, if the party pawns for another. And the person pawning is required to take the same.

— Where the sum lent is under 5s. it shall be given *gratis*.

If 5s. and under 10s. there shall be paid to the pawnbroker one halfpenny.

If 10s. and under 20s. — 1d.

If 20s. and under £5, — 2d.

If £5, or upwards, — 4d.

Which

Which note shall be produced, before the pawnbroker shall be obliged to re-deliver such goods; except a note shall have been lost, mislaid, destroyed, or fraudulently obtained from the owner. The broker, at the request of any person who shall represent himself as the owner, shall deliver him a copy of the note, with the form of an affidavit of the circumstances; for which, if the money lent shall not exceed 10s. the broker shall receive 1d.: and, if above 10s. the same as for the original note. And the party shall, to the satisfaction of a justice, verify on oath the circumstances; on which he may redeem, leaving the note and affidavit with the broker.

And all pawned goods shall be forfeited at the expiration of one year: unless, before the end of the year, the party give notice not to sell them, when he may redeem them at any time within three months.

Persons producing the note are to be deemed the owners, unless it has been lost or obtained and proceeded upon as aforesaid; and unless he has had previous notice from the owner not to deliver the goods, or that they are suspected to have been fraudulently or feloniously obtained.

Persons pawning goods the property of others, not being employed or authorized by the owner, shall forfeit 20s. and the value of the goods, or be committed to hard labour not less than one, nor more than three, months, and be publicly whipped.

Persons forging or altering notes, or knowingly uttering or selling them knowing them to be forged or altered, shall suffer a like imprisonment. And the person, or his servant or agent, to whom a note shall be uttered or offered, having reason to suspect that it is forged, may seize the party, and deliver him to a constable.

And persons offering goods in pawn, unable or unwilling to give account of themselves, or giving any false information; or if there shall be any other reason to suspect them

to be stolen, or illegally or clandestinely obtained; or persons claiming to redeem goods without colour of title; may be in like manner seized. And the justice, if he sees any cause to suspect the goods were stolen, &c. he may commit him for farther examination.

Pledging is a *bailment* of goods by a debtor to his creditor, to be kept till the debt be discharged.

A *pawn* is therefore a thing delivered by way of pledge, and is called *vadium*; and in such goods the pawnee has a special property: and the law expects that ordinary diligence be used to preserve goods so pledged from loss or injury. Thus it has been said, as to jewels pawned to a lady, that, if she keep them in a bag, and they are stolen, she shall not be answerable; but, if she go with them to a play, and they are stolen, she shall. *Bull. N. P.* 72.

But, as it seems that a bailee cannot be considered as using *ordinary* diligence, who suffers the goods bailed to be taken by *stealth* out of his custody, a respectable opinion suggests, that it follows, that a *pawnee* shall *not* be discharged if the pawn be simply *stolen*; but that his debt shall not be extinguished if he be forcibly *robbed* of it, *without his fault*. *Jones L. of Bailment*, 76.

And this agrees with the manner in which Lord *Holt* puts the case. "If," says he, "she keep the jewels *locked up* in her cabinet, and her cabinet be *broken open*, "and the jewels taken thence, she will not be answerable." *L. Raym.* 917.

A *general bailee* has a *limited* property in the goods entrusted to his care. He may not, however, *use* them, on any account, without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed; and this presumption varies as the thing is likely to be better or worse, or not at all affected, by usage; since, if *Caius* deposit a *setting-dog* with *Titius*, he can hardly be supposed unwilling that the dog should be used

for partridge-shooting, and thus be confirmed in those habits which make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarcely imagine that he would suffer them to be worn. And, on the other hand, it may justly be inferred, that he would gladly indulge *Titius* in the liberty of using the *books* of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the *pawnee* of goods, which will be *impaired* by usage, cannot use them; but it would perhaps be otherwise if the thing pawned actually *required* exercise, and a continuance of habits, as sporting-dogs and horses. *Jones on Bailments*, 80.

It is said that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge. *Owen*, 124.

After money paid, (and tender and refusal are the same,) it ceases to be a *pledge*; and therefore a pawnor may either bring an action of assumpsit, and declare that the defendant promised to return the goods upon request; or an action of trover, the property being vested in him by the tender. 2 *Cro.* 244: *Cro. Jac.* 243: *Yelv.* 149: 1 *Bulstr.* 29: 1 *Inst.* 89.

If a pawnee lose goods after the money for which they were pawned has been tendered, he shall be chargeable; for, he is a wrong doer. For more on this subject, *see* 2 *Salk.* 522: 3 *Salk.* 268: *Yelv.* 178: *Cro. Jac.* 244: 1 *Bulstr.* 29, 30: 1 *Roll. Rep.* 101.

A factor cannot pawn the goods of his principal. *Str.* 1178. He to whom goods are delivered for safe custody cannot pawn them. *Id.* There can be no market-overt for pawning. 1 *Inst.* 89.

As the pawnee of goods hath a special property in them, to detain them for his security, &c. so he may assign the
pawnee

pawn over to another, subject to the same conditions; and, if the pawnee die before they are redeemed, his executors shall have them on the same terms.

If goods pawned are perishable, and they lie in pawn till spoiled, without any default in the pawnee, the pawner shall bear the loss; and he, to whom they were pawned, may have an action of debt for his money. *Co. Litt.* 89, 208: *Yelv.* 179.

Where goods are pawned for money borrowed, without a day set for redemption, they are redeemable at any time during the life of the pawner. They may be redeemed after the death of him to whom pawned; but not after the death of him who pawned the goods. *2 Cro.* 245: *Noy*, 137: *1 Bulst.* 9.

But, where a day is appointed, and the pawner dieth before the day, his executors may redeem the pawn at the day, and this shall be affets in their hands. *1 Bulst.* 30, 31. If goods are redeemable at a day certain, it must be strictly observed; and the pawnee, in case of failure of payment at the day, may sell them. *1 Roll. Rep.* 181, 215. But still the right owner has his redemption in equity, as in case of a mortgage. *1 Inst.* 205: *Shep.* 106.

PENALTIES.

The real debt on a bond is one thing, the penalty, a security both in law and equity, and no more than the real sum owing, shall be recovered. *Earl Mansfield, MS.*

In an action on a bond, with condition to account for money to be received, damages may be recovered for more than the penalty, and the court will not stay proceedings upon paying the penalty into court. *2 T. Rep.* 388.

A person may recover damages on partial breaches of articles with a penalty, as often as they occur. *Burr.* 1351.

It was formerly thought that, where there was a bond given to perform an agreement, the obligor had his election either to do the thing or pay the money ; and that the obligee, having chosen his security, ought to be left to it ; yet now they consider the penalty only as a collateral guard to the agreement which still remains the same, and unimpeached by the parties providing a farther remedy at law for the performance, and therefore proper to be executed in a court of equity. 1 *Treat. Eq.* 141.

Where a penalty is intended merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as occasional, and therefore only to secure the damage really incurred. *Per Lord Thurlow, Sloman v. Walter*, 1 *Bro. Rep.* 418. And, upon this construction of a penalty, courts of equity will interpose to restrain proceedings at law to recover a penalty. But, as courts of equity will interpose to restrain the recovery of the penalty, the principles of equal justice require that they should enforce the specific performance of the act agreed to be done, or refrain from the doing of that which was agreed should not be done. And, upon this principle, wherever the primary object of the agreement be the securing of the specific subject of the covenant, the party covenanting is not entitled to elect whether he will perform his covenant or pay the penalty. 2 *P. Wms.* 191 : 10 *Mod.* 517 : 2 *Vez.* 528. But, if the covenant be to do, or not to do, some particular act, or doing it, or neglecting to do it, to pay a certain sum, by way of liquidated damages, courts of equity will not relieve against the payment of such damages. *Finch's Rep.* 117 : 6 *Bro. P. C.* 470 : 4 *Burr.* 2228. See also *Prec. Chan.* 102. And, as courts of equity will not relieve against stipulated damages, they will not in general interpose to enforce the performance of the covenant, or to restrain its violation ; therefore, where the lessee covenanted

not

not to plough certain lands, or, if he did, to pay 20s. per acre per annum, the court refused to restrain the lessee from ploughing. 2 *Vern.* 119. But there are some circumstances which will induce the court to interfere, though stipulated damages be reserved: as, where the lessee had covenanted not to plough *ancient* meadow, or, if he did, to pay an increase of rent; the court, upon his threatening to plough, appears to have granted an injunction. 1 *Treat. Eq.* 142.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives the party all that he expected or desired; as in the case of penalties for non-payment of rents or fines, which are only by way of security of the rent or fine; and, therefore, when these are paid with interest, the money itself is paid according to the intent, only as to the circumstance of time, which is the true foundation of equitable relief. 1 *Str.* 453: 1 *Bro. Rep.* 418.

PERSONALTY.— See *Distribution*.

PEW.

As the churchwardens of a parish have the care of the church, so also have they of all the seats therein; and not only to repair them, but also to see that good order be preserved in them, and no disturbance or contention be made about them; but that every man regularly take that seat and that place in it which he hath a right to; whether it be by prescription, or that he hath been placed there by order of the bishop or by themselves. *Prideaux's Dir. to Ch.-Ward.* 69.*

* A new edition of the learned Dean PRIDEAUX's most excellent "*Directions to Churchwardens for the faithful Discharge of their Office*" is preparing for the press, and will be speedily published, with notes, &c. by the editor of these sheets.

All such seats as are not claimed by *faculty* or *prescription*, and which are repaired at the charges of the parish, are in the disposal of the churchwardens, but still in subordination to the bishop, who hath the primary right of disposing and ordering of this matter in every church in his diocese. *Id.* 71.

Although the seats in the body of the church be fixed to the freehold, which is the minister's, yet the materials do not therefore become his when taken down again, but belong to the churchwardens for the use of the parishioners. *Id.* 73.

If a person has a right to sit in a particular pew in a church, and is disturbed therein, he may have an action; but he must set forth his title to be either by *prescription*,* as appurtenant to a messuage, or by a *faculty* from the ordinary. And bare possession, though for above sixty years, will not give a right. 1 *T. Rep.* 428.

But, when a person claims by *prescription*, evidence of an uninterrupted *possession* for a series of years, under a gift from the rector and churchwardens, after the rebuilding of the church, will be sufficient; for, it will be presumed, that the possession was given under an old immemorial right. 1 *T. Rep.* 431.

So, uninterrupted *possession* of a pew in the chancel for thirty years, unexplained, is presumptive evidence of a prescriptive right to a pew, in an action against a wrong doer. But that presumption may be rebutted by proof that, prior to that time, the pew had no existence. 5 *T. Rep.* 297.

If a *faculty* be annexed to a messuage, it may be transferred with the messuage to another person. 1 *T. Rep.* 431.

An action of *trespafs* will not lie for entering into a pew, because the plaintiff hath not the exclusive possession, the possession of the church being in the parson. 1 *T. Rep.* 430. It must be an action *on the case*.

* *Prescription* is to a single person what *custom* is to many.

PIGEONS.

If pigeons come upon my land, and I kill them, the owner hath no remedy against me, though I may be liable to the statutes which make it penal to destroy them. 1 Jac. I. c. 27, sect. 2 : 2 Geo. III. c. 29.

A lord of a manor may build a pigeon-house, or dove-cote, upon his land, parcel of the manor ; but a tenant of the manor cannot, without the lord's license. 3 Salk. 248.

Formerly, none but the lord of the manor or the parson might erect a pigeon-house ; though it has since been held, that any *freeholder* may build a pigeon-house on his own ground. 5 Rep. 104 : Cro. Eliz. 548 : Cro. Jac. 382, 440.

PILOTS.

Before a ship arrives at her place or bed, while she is under the charge of the pilot, if she or her goods perish or be spoiled, the pilot shall answer ; but, after the ship is brought to the harbour, then the master is to take charge of her, and answer all damages, except from the act of God, &c. Leg. Ol. c. 23.

In charter-parties of affreightment, the master generally covenants to find a pilot, and the merchant to pay him ; and, in case the ship shall miscarry through the insufficiency of the pilot, the merchant may charge either the master or the pilot ; and, if he charges the master, such master may have his remedy against the pilot. *Lex Merc.* 70. See MASTERS OF VESSELS.

PIMP-TENURE.

The following quotation is introduced merely to shew, that vice is not in the present day so much in fashion and so

shameless as it was in the days of our ancestors: it is a statement of a species of *tenure*. — “Willielmus Hoppeſhor tenet dimidiam virgatum terræ in Rockhampton de domino rege, per ſervitium cuſtodiendi ſex demiſellas, ſcil. meretrices, ad uſum domini regis;” — i. e. “William Hoppeſhor holds half a rood of land in Rockhampton of the lord the king, by the ſervice of keeping ſix damſels, viz. whores, for the uſe of the lord the king.” 12 Edw. I.: *Blount's Ten.* 39.

PIRATES.

Piracy is an offence againſt the univerſal law of ſociety, and therefore pirates are conſidered as enemies to all. They are denied ſuccour by the law of nations; and, by the civil law, a ranſom promiſed to a pirate, if not complied with, creates no wrong. *Lex Merc.* 183.

If a pirate enters a port or haven, and aſſaults and robs a merchant-ſhip at anchor there, this is not piracy, becauſe it is not done upon the high ſea; but it is a robbery at common law, the act being done within the body of the county; and, if the crime be committed *ſuper altum mare*, (upon the high ſea,) or in great rivers within the realm, which are looked upon as common highways, there it is ſaid to be piracy. *Moor.* 756.

A pirate takes goods upon the ſea and ſells them, the property is not altered. *Godb.* 193: ſee *Stat.* 27 Edw. III. ſtat. 2, c. 13. But, if goods of the ſubjects of a prince at enmity are ſo taken, and ſold in a market overt here, the ſale is good. *Hob.* 79.

PISCARY. — See *Fish.*

It has been held that, where the lord of the manor hath the ſoil on both ſides the river, it is good evidence that he hath the *right* of fiſhing, and puts the proof upon him who claims a free fiſhery; but, where a river ebbs and flows,
and

and is an arm of the sea, there it is *common to all*, and he who claims a privilege to himself must prove it; for, if an action of trespass is brought for fishing there, the defendant may justify that the place in question is an arm of the sea, in which every subject hath and ought to have free fishery. *Jac. L. Dict. by Toml.*

In the *Severn*, the soil belongs to the owners of the land on each side; but the soil of the *Thames* is in the king, &c. and the fishing is common to all. 1 *Mod.* 105.

He who is owner of the soil of a private river hath a *separate* or *several fishery*; and he that hath a *free fishery* hath a property in the fish, and may bring a possessory action for them; but a *common of fishery* is like all other commons. 2 *Salk.* 637.

PLACES, SALE OF. — See *Offices*.

PLEDGES. — See *Pawning*.

POLICY. — See *Insurance*.

By the *Stat.* 17 Geo. III. c. 50, the stamp for a policy of assurance on house, goods, or life, on any sum not exceeding £1000, is 6s.; if above £1000, 11s.

But, by *Stat.* 37 Geo. III. c. 90, sect. 23, the above duties on policies, so far as they relate to policies for insuring houses, furniture, goods, wares, merchandize, or other property, *from loss by fire*, are repealed, and the following, after July 5, 1797, to be paid in lieu.

For every policy of assurance, where the sum insured shall not amount to £1000, the sum of 3s.; and, where it shall amount to £1000, or upwards, 6s.

POSSIBILITY. — See *Assignment*.

POST-MASTER.

The post-master is obliged to deliver the letters sent by the general post at the respective habitations of the persons residing

residing in the post-towns, to whom such letters are addressed, for the mere rates or price settled by act of parliament; and, for refusal or neglect so to do, an action will lie. 4 *Burr.* 4153: 5 *Burr.* 2709: 3 *Wils.* 449: *Cowp.* 184, 187: 2 *Black. Rep.* 906.

There is no resemblance or analogy between the *post-master* and a carrier; and therefore it has been determined, that an action will not lie against the post-master-general for any loss or damage that may happen through the negligence or dishonesty of any person employed under him to conduct or carry on the business of the office, but against him only by whose actual negligence the loss accrued. *Cowp.* 754: 1 *Salk.* 17.

The best way of sending bank-notes by the post is to divide them, and send the halves by several posts; for, the Bank, upon notice, would not pay the half which had been improperly obtained.

POUND.

A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing was legally impounded or not. 1 *T. Rep.* 62.

There is a difference between a *common pound*, an *open pound*, (pound overt,) and a *close pound*, (pound covert,) as to cattle impounded; for, where cattle are kept in a common pound, no notice is necessary to the owner to feed them; but, if they are put into any other open place, notice is to be given, and he is then also bound to feed them: and, if beasts are impounded in a pound-close, as in the distrainer's stable, &c. he is to feed them at his peril. *Co. Litt.* 47.

A common pound belongs to a township, lordship, or village; and ought in every parish to be kept in repair by those who have time out of mind been used to repair it.

The

The oversight whereof is in the steward in the leet, where any default herein is punishable. *Dier*, 288: *Noy*, 52.

If a distress be taken and impounded, though without just cause, the owner cannot break the pound and take away the distress. And, for pound-breaches, action on the case lies, wherein treble damages may be recovered. *Co. Litt.* 261: *Stat.* 2 W. and M. stat. 1, c. 5.

PREFERENCE. — See *Executors*, *Priority*.

PRICE. — See *Consideration*.

PRINCIPAL AND AGENT. — See *Agent*, *Factor*.

PRINCIPAL AND SURETY. — See *Surety*.

PRINTS.

By the 8 Geo. II. c. 13, and 7 Geo. III. c. 38, inventors of prints and engravings are entitled to the sole printing and publishing for twenty-eight years.

PRIORITY. — See *Bankrupts*, *Judgements*, *Executions*, *Executors*.

There is no priority of time in *judgements*; for, the judgement first *executed* shall be first paid. And the priority of *executions* is determined by the time of their delivery to the sheriff, without any regard to the seizure by his bailiffs, who are but his servants. 1 *T. Rep.* 729.

A debt on a judgement against a testator or intestate, not docketed according to the directions of the *Stat.* 4 and 5 W. and M. c. 20, is put by that act on a level with simple-contract debts. 6 *T. Rep.* 384.

He who first commences his action against an executor or administrator shall be entitled to a preference in payment. 3 *Black. Com.* 19: *Dier*, 32: 2 *Leon.* 60.

If

If there be several debts due on several bonds from the testator, his executor may pay which bond-debt he pleases, except an action of debt is already commenced against him upon one of those bonds; and, in such case, if pending an action, another bond-creditor brings another action against him, before judgement obtained by either of them, he may prefer which he will, by *confessing a judgement* to one and paying him, which judgement he may plead in bar to the other action. *Vaug.* 83: *See Sid.* 21. But this judgement confessed must be before plea. The usual way, if there is time, and an executor or administrator is desirous of preferring another creditor of equal degree with him who sues, is, instantly, before plea, to confess a judgement, and then plead it, with a *plenè administravit ultra*. *Toml. Dict.* v. *Executor*, V. vi.

But if one hath a debt due to him of an inferior nature, and the executor be sued for it, he must not pay the debt, if others of a superior nature remain unsatisfied; nor must he suffer the plaintiff to recover in this action; for, if he doth either, and he hath not assets besides to satisfy the superior debts, he must satisfy so much out of his own pocket. He should plead and set forth those superior debts, and should say, that he hath no more than what is sufficient to satisfy them, and thereby he shall bar the plaintiff in his action.

Bonds have a preference, though the day of payment is not yet come. 3 *Lev.* 57.

If lands are devised to trustees for payment of debts, debts by simple contract and by specialty shall be paid in proportion; and, though the trustees are creditors to the testator, or sureties for him, yet they shall not be allowed to prefer themselves. 2 *Ch. Caf.* 54. All debts, where the devise is to a trustee, shall be paid in average, except those which affect land. *Vern.* 63. But, if lands are devised to an executor, they become legal assets, and the debts shall be paid in a course of administration, and according

to

to the precedency or priority at law. *Vent.* 63: 2 *Ch. Rep.* 262: *Ch. Ca.* 248: *Roll. Abr.* 920: *Hobart*, 265. So that, if the assets are *legal*, they must be administered in a regular course, according to the degree of the debt; if equitable only, all debts, of whatever degree, are to be paid equally.

PRIVATEERS.

These are private ships of war, and they may not attempt any thing against the law of nations; as to assault an enemy in a port or haven, under the protection of any prince or republic, whether he be friend, ally, or neuter; for, the peace of such places must be inviolably kept. *Lex Merc.* 177, 178.

PRIVILEGE OF PARLIAMENT.

A commoner in parliament is entitled to the freedom of his person (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting; and this, as parliament is seldom prorogued for more than eighty days, makes their privilege perpetual. 1 *Black. Com.* 165.

PRIZE-MONEY.

Every instrument, by which a seaman or mariner conveys his prize-money or wages in the hands of the public officers, must be in the form prescribed by the *Stat.* 26 Geo. III. c. 63, and the other statutes to which it refers. 6 *T. Rep.* 426.

It has been a question, whether an officer, under arrest and suspension on-board the fleet for an offence of which he is afterwards acquitted, is entitled to prize-money during such arrest and suspension; 1 *T. Rep.* 493; which has since been determined in the affirmative. 8 *T. Rep.* 224.

PROBATE.

PROBATE.

Probates should be made within four months next after the testator's death. 4 *Burn, Eccl.* 192. If testator before his death moved from the place where he lived at the time of his making his will, or if he makes a codicil, wherein he is described as of another place, on applying for a probate, somebody must identify the testator on oath.

Duties. — Of estates above £20, and under £100, — 10s.

If of the value of £100, and under £300, — £2 : 10.

If £300, and under £600, — £5 : 10. And, by 37 Geo. III. c. 90, an additional £2 : 10.

If £600, and under £1000, — £8. And, by 37 Geo. III. an additional £4.

If £1000 and upwards, £14. And, by 37 Geo. III. an additional £6.

If £2000 and upwards, £20. And, by 37 Geo. III. an additional £10.

If £5000 and upwards, £30. And, by 37 Geo. III. an additional £15.

If £10,000 and upwards, £40. And, by 37 Geo. III. an additional £20.

And if any one administer personal estate without probate or letters of administration, within six months after the death of the party, he shall forfeit £50. 37 Geo. III. c. 90.

It is a common practice to grant administrations to the attorneys of creditors, who are beyond the seas. And the administration granted to the attorney of the creditor, who is abroad, is well granted, if the proper citation preceded it.

PROCURATION.

PROCURATION. — See *Bills of Exchange*.

PROMISE. — See *Contracts*.

PROMISSORY-NOTES. — See *Bills of Exchange, and Notes of Hand*.

PROPERTY. — See *Bailment, Occupancy*.

For preserving property, the law hath these rules.

1. No man is to deprive another of his property, or disturb him in enjoying it.

2. Every person is bound to take due care of his own property, so as the neglect thereof may not injure his neighbour.

3. All persons must so use their right, that they do not, in the manner of doing it, damage their neighbour's property.

An executor or administrator hath the property of the goods of the deceased: but a servant hath neither a general nor special property in his master's goods; therefore, to take them from his master may be either a trespass or a felony, according to the value and other circumstances. *Goldsb.* 72.

If a swarm of bees alight on a tree, they are not the owner's of the tree, till covered with his hive; no more than hawks that have made their nests there, &c. But their young ones will be his property, and for them he may have trespass. *Doct. and Stud.* c. 5: *Co. Lit.* 145.

None can have an absolute property in wild beasts, deer, hares, conies, &c. though they belong to a man on account of his game and pleasure; but, if they are enclosed and made tame, there may be a qualified and possessory property in them. One may have an absolute property in things of a base nature, as mastiff-dogs, hounds, spaniels, &c.; but not in things *wild by nature* while living; and even,

even, as to these, there may be an absolute property when they are dead. *Dalt.* 371: *Finch*, 176: 11 *Rep.* 50: *Raym.* 16.

PROTEST. — See *Bills of Exchange*.

PROVISIONS. — See *Victuals*.

PURCHASES. — See *Contracts, Deposit*.

For a statement of the interest made on purchases, see **STOCKS**.

Upon a contract for a purchase, if the title proves bad and the vender is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost. *De Grey, East.* 16 Geo. III. If money be deposited at the time of the contract, and the sale appears to be bad, the return of the deposit with interest and costs is all that can be expected. 2 *Black. Rep.* 1079.

QUALIFICATIONS. — See *Game, Jurors*.

RANSOM. — See *Insurance, ante* p. 269.

A ship was taken by the French: the master, having a share in her, ransomed her for £1800, and was taken to France as a hostage for the money. The ransom-money must be raised out of the profits, notwithstanding any former mortgage of the ship; for, if there was a precedent mortgage, what would become of that security, if the ship had not been redeemed? After the ship was redeemed, she performed her intended voyage, and the freight-money received after redemption was the first profits arising, and out of them the ransom-money is to be satisfied. — The insurers always pay a part of the ransom-money. 3 *Eq. Abr.* 690. But see *Stat.* 22 Geo. III. c. 25, and 35 Geo. III. c. 66, which invalidates ransoms of ships.

In

In case of a ransom-bill, the owners are not liable beyond the ship and cargo. 1 *T. Rep.* 76.

But a promise by a captain of a ship, on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. *Id.* 73.

Q. Whether, after a capture and ransom, the owner is liable to pay wages for the time which elapsed previous to the capture? *Id.* 79.

REBATE. — See *Discount*.

REBELS.

The guilt of many crimes may be taken away where they are committed through force, and fear of death or other bodily harm; [See *NECESSITY*;] therefore, in time of war or rebellion, a man may be justified in acting by compulsion of the enemy or rebels. 1 *Hal. P. C.* 50. But the fear of having houses burnt or goods spoiled is no excuse, in the eye of the law, for joining and marching with rebels. The only force that doth excuse is a force upon the *person*, and present fear of death; and this force must continue all the time the party remains with the rebels. It is incumbent upon men, who make force their defence, to shew an actual force, and that they joined for fear of death, and that they receded as soon as they were able. *Fost.* 14, 216.

RECAPTION. — See *Restitution*.

Where one hath deprived another of his property, the owner may lawfully claim and retake it wherever he happens to find it, so it be not in a riotous manner, or

D d

attended

attended with any breach of the peace. 3 *Black. Com.* 4.* Even though the form be altered; as if timber be cut in boards, or cloth be made into clothes. 2 *Morg. V. M.* 273. The law seems to be, that, if my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law. 2 *Roll. Rep.* 55, 56, 208: 2 *Roll. Abr.* 365, 566.

It is laid down in the year-books, that, whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into gloves, cloth into a coat; or if a tree be squared into timber, or silver melted or beat into a different shape. 5 *Hen. VII.* 15: 12 *Hen. VIII.* 10. But, if the thing itself, by such operation, were changed into a different species, as by making wine, oil, or bread, from another's grapes, olives, or wheat, the civil law held that it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted. These doctrines are implicitly copied and adopted by *Bracton*, and have been since confirmed by many resolutions of our courts. *Bract.* 1. ii. sect. 2, 3: *Bro. Abr.* title PROPERTY, 23: *Moor*, 20: *Poph.* 38.

RECEIPTS. — See *Acquittances*.

A receipt cannot be insisted upon by the party tendering money; that is, the giving a receipt cannot be made a condition at the time of a tender. *Peake*, 179. See TENDER.

* This must be understood to extend to all cases where a man's goods are out of his possession by wrong, and not by his own delivery. *Crisp. Eliz.* 329.

A receipt in full is conclusive evidence, when given under a knowledge of all circumstances between the parties; but it may be otherwise when given without such knowledge. 1 *Espin. Rep.* 173.

Stamp-duties. — Receipt, discharge, or acquittance, for money, amounting to forty shillings, and not amounting to £20, — 2 *d.*

Amounting to £20, and not £50, — 4 *d.*

Amounting to £50 and upwards, — 6 *d.*

Amounting to £100, and not £500, — 6 *d.* and 6 *d.* — 1 *s.*

Amounting to £500 or upwards, an additional 1 *s.* — 2 *s.*

All receipts, notes, memorandums, or writings, expressing a general acknowledgement of any debt, &c. being paid, settled, &c. or whereby any money shall be acknowledged to be in full, and whether signed or not, 2 *s.*

The full sum and the true date shall be inserted; and all notes, memorandums, or writings, whatever, whereby any money shall be acknowledged to have been paid, settled, received, accounted for, balanced, discharged, released, or in any manner satisfied, or which shall in any manner signify such acknowledgement, and whether same shall or shall not be signed, shall be deemed a receipt, and liable to the duties. 35 Geo. III. c. 55, sect. 5. This extends to any part of any debt. *Sect.* 7.

After the 5th of July, 1795, *writing* or *signing* a receipt without the proper stamp, or upon too low a stamp, incurs a forfeiture of £10, if the sum does not amount to £100; and £20 if it amounts to £100 or upwards. And *giving* a receipt, in which a less sum shall be expressed than the sum paid, and all persons who shall divide the sum received into divers sums, with intent to evade the duties, or write off any part of any debt, or who shall be guilty of any device whatever to defraud the duties, shall forfeit £50. *Sect.* 9.

Receipts on unstamped paper, brought to the Stamp-Office within fourteen days after given, may be stamped on payment of £5 over the duty. If after fourteen days, and within one calendar-month, on payment of £10. And the parties are discharged from the penalties. 35 Geo. III. c. 25.

Informers may prosecute within one year, the attorney-general within three years.

RECEIVER. — See *Agent*.

RECKONING.

If any inn-keeper, &c. in giving any account or reckoning in writing, or otherwise, shall refuse to give in the particular number of quarts or pints, or shall sell in measures not marked, he shall not, for default of payment thereof, detain any goods, &c. of the debtor, but shall be left to his action at law. 11 and 12 W. III. c. 15, sect. 2.

If several persons go to a tavern and contract a debt, and all but one go away without paying their shares, and he who is left pays the whole, the law implies a promise, and gives him a remedy over against the other persons. This doctrine was recognised by Lord Kenyon, in the case of *Child v. Morley*, *Trin.* 40 Geo. III. See *Roll. Abr.*

RE-EXCHANGE.

Re-exchange is the like sum of money, payable by the drawer of a bill of exchange, which is returned protested, as the exchange of the sum mentioned in the bill is, back again to the place whence it was drawn. *Lex Merc.* 98.

REFUNDING.

A. an attorney, being ill, takes B. for his clerk, and receives £120; and, by articles, agrees with the father of B.

B. to return £60 of the money if he died within a year. A. died within three weeks. The executor of A. was decreed to pay back 100 guineas. *Vern.* 466.

Where an executor, under the decree of a court of equity, receives a sum supposed to be due to him, and he pays it away to the creditors of his testator, and it afterwards appears that only a part of the money was actually due to the executor, a court of equity will compel him to refund the surplus, and permit the executor to sue such creditors, as through mistake he had paid, to refund. 1 *P. Wms.* 355. See MISTAKE.

REGRATING. — See *Forestalling*.

This is an offence punishable by fine and imprisonment, and consists in buying and selling again in the same market, or within four miles thereof. See *Spelm. v. Regratarius*.

RENEWALS OF LEASES. — See *Annuities, Tenant's Right*.

RENT. — See *Landlords and Tenants*.

Rent is demandable and payable before the time of sunset of the day on which it is reserved, though perhaps not absolutely due till midnight. 2 *Black. Com.* 43. The learned commentator expresses himself in this instance with caution and doubt; but it is now clearly settled that, if the lessor dies before sunset of the day on which the rent is demandable, the rent unpaid belongs to the heir, and not to the executor: but, if he dies after sunset and before midnight, it seems to be the better opinion that it shall go to the executor, and not to the heir. 1 *P. Wms.* 178.

A tender of the rent to save the forfeiture of a lease must be of the whole, without deduction of taxes or assessments, (except it be the land-tax,) or any other charges; for, stoppage is no payment. *Say. Rep.* 79.

Where notice is given to quit or pay an increased rent, the holding over is an assent to the new rent, and the landlord may recover it in an action for use and occupation. *Lofft's Rep.* 154, 155.

By 4 Geo. II. c. 28, tenant for life or years holding over, or persons coming in under them, after the determination of the term, and demand made, and notice in writing (11 Geo. II. c. 19) given by the remainder-man or reversioner, or his agent, properly qualified for delivering possession, he shall pay for the time he detains the lands double their yearly value. 1 *T. Rep.* 53.

Notice under this statute may be given previous to the expiration of the lease. 2 *Black. Rep.* 1075. — *Note.* The notice in writing is a sufficient demand within the meaning of the statute. 5 *Burr.* 2694.

And, by 11 Geo. II. c. 19, if any tenant shall give notice of his intention to quit, and shall not deliver possession at the time, he shall thenceforth pay double the former rent. — *Note.* A parole notice is sufficient. 3 *Burr.* 1603.

To become entitled to double rent, under *Stat.* 4 Geo. II. c. 28, demand the possession the day after the term expires. It should be done by the lessor, or his attorney lawfully constituted. 3 *Morg. : Vade Mec.* 619.

Upon the plea that the party owes nothing, the last receipt is good evidence that all the rent before the receipt is paid. *Gillb. L. Evid.* 160.

Rent on a parole demise is recoverable by action on the case for the use and occupation. See *Stat.* 11 Geo. II. c. 19.

An action will not lie to recover for the use and occupation of rooms let to a woman of the town, where the person letting, knew at the time that she meant to receive male visitors there for the purpose of prostitution; the contract being *contra bonos mores*. 1 *Espin. Rep.* 13.

If

If the lessee of two tenants in common pay the whole of the rent to one, after notice from the other to pay them each a moiety, the tenant in common, who gave such notice, may distrain for his share. 5 *T. Rep.* 246.

There can be no set off to an avowry for rent. 4 *T. Rep.* 511: 4 *T. Rep.* 123, *n.* But it is said that, to an avowry for rent, the tenant may plead payment of a ground-rent to the original landlord. 4 *T. Rep.* 511. And it is said, that an under-tenant cannot discharge himself of the rent due from him to his immediate landlord, by a voluntary payment of rent to the original landlord, unless it be through coercion of a threatened distress. See *REPAIRS*.

To an action of debt for rent, defendant may, under the general issue, give in evidence *that he paid the rent to persons who had rent-charges out of the land* by command of the lessor; for, payment by plaintiff's appointment, is payment to himself. *Cro. Eliz.* 222.

REPAIRS. — See *Esflowes, Landlords and Tenants*.

If, in a lease, tenant covenant to repair, with an exception of damages by tempest, and a tempest does great injury, the landlord is not compellable to rebuild, without there is in the lease an express covenant for that purpose on the part of the landlord. [See *FIRE*.] And, if the tenant repairs, he cannot set off the amount paid against the rent. If, however, he fairly lays out money on repairing what he was not bound to repair, perhaps a court of equity will give relief. — But, *Q.* Whether a tenant cannot deduct out of his rent the expense he has been at in absolutely-necessary repairs, after having given notice of the want of repairs; and that he shall proceed to repair the same, and deduct the expense thereof out of the rent, unless such repairs are done in a reasonable time. See 6 *T. Rep.* 488, 650: *Bro. Cov. Pl.* 4: 2 *Saund.* 420.

Where a lessor covenanted to repair, in an action of debt for the rent, the lessee may plead "that he had expended "the rent in necessary repairs," which it seems by law he can do: (though this was doubted by *Holt*, 1 *L. Raym.* 420, *therefore quere?*) but it must be pleaded. *Cro. Eliz.* 222: 1 *Leon.* 237.

If a house be so out of repair as to endanger the public, a tenant-at-will (although as to the landlord he is not bound to repair) may, for the public safety, be compelled by indictment. 2 *L. Raym.* 856.

If a tenant covenant to repair and landlord to provide rough timber, &c. the first act, that is, a demand of those materials, must be made by the tenant.

A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him; but not to do substantial and lasting repairs. 2 *Espin. Rep.* 390.

If a lessee covenants to keep a house in repair, and leave it in as good plight as it was at the time of making the lease; in this case, the *ordinary and natural decay* is no breach of covenant. But the lessee is bound to do his best to keep it in the same plight, and should keep it covered. *Fitz. Abr. title Covenant, fo. 4.*

And, where there is this covenant on the part of the lessee, *if he pulls down houses, or suffers them to decay*, no action will lie till the end of the term; for, before that time, *he may repair them*: but, *if he cuts down timber or trees*, covenant lies immediately; for, such cannot be replaced in the same plight at the end of the term. *F. N. B.* 342.

A general covenant to repair and to deliver up in repair shall extend to whatever erections or buildings shall be raised during the term. 3 *Lev.* 264: 2 *Vent.* 126, *S. C.*

REPLEVYN.

In order to replevy, go to the sheriff's office with the plaintiff and two sufficient sureties, who must be bound in double the value of the goods distrained to prosecute with effect. *Stat. 11 Geo. II. c. 19.* Pay £1 : 1 to the sheriff's office, and £1 : 1 to the officer. If it be a replevyn of goods, a person disinterested must attend to swear to their value ; but this need only be done where the distress is for rent, not where for *damage feasant*.

Replevyns are in the first instance prosecuted in the county-court, but either party may remove them into the Court of King's Bench or Common Pleas by *recordari* or *pone* ; the plaintiff at pleasure, the defendant on reasonable cause ; as, that either party is related to the lord or sheriff, that they are interested, &c. 2 *Inst.* 139.

Plaintiff in replevyn has an appearance entered at the next county-court.

If a landlord comes on the land to distrain, and the tenant then actually *tenders* the arrears due, in such case, if he distrains the cattle, it is tortious, and the tenant may replevy. 8 *Co.* 147, *a.* And the tender must be before the impounding. *Cro. Eliz.* 813. Also, in case of distress for doing damage, the party may tender amends till the cattle are impounded ; but, after that, it is too late, and a tender to the bailiff or servant is not good. 5 *Co.* 76 : *Cro. Eliz.* 813.

REPUTATION OF FAME.

The security of reputation, or good name, from the arts of detraction or slander, are rights to which every man is entitled by reason and natural justice, and the law of England is solicitous in its protection.

REPRISALS.

REPRISALS.

A reprisal is the taking one thing in satisfaction for another.

Reprisals are either *ordinary* or *extraordinary*. Ordinary reprisals are to arrest the goods of merchant-strangers within the realm; and the other is for satisfaction out of the realm, and is under the great seal. *Lex Merc.* 120.

If any person be killed, wounded, spoiled, or any ways damaged in a hostile manner, in the territories of any potentate, to whom letters of request are transmitted, and no satisfaction be made, there is no necessity to resort to the ordinary prosecution, but letters of reprisal issue forth; and the prince, against whom the same are issued, is obliged to make satisfaction out of the estates of the persons committing the injuries; and, in case of a deficiency there, it will be adjudged a common debt on his country. But, where misfortunes happen to persons or their goods, residing in a foreign country in time of war, reprisals are not to be granted. In this case, they must be contented to sit down under their loss, for they are at liberty to relinquish the place on the approach of the enemy, when they foresee the country is subject to spoil; and, if they continue, they must partake of the common calamity. *Lex Merc.*

And reprisals may be granted on illegal prosecutions in a foreign country.

REQUEST. — See *Demand, Repairs.*

If a promise is made to pay money on request, no special request is required, because there is a precedent duty: as for instance, if one buys or borrows a horse, and promises to pay so much on request.* But, where the promise is collateral, as to pay the debt of a stranger on re-

* For, in this case, there is a duty even without the promise.

quest, the request is part of the agreement, and traversable, there being no duty before the promise made; and, for that reason, the request must be specially alleged; for, bringing the action will not be a sufficient request. *Latch.* 93: 3. *Leon.* 200: 3 *Salk.* 308.

If the condition of a bond be that the obligor shall do any thing upon request, the obligor, until request made, is not obliged to do any thing towards it. And yet, if the obligor disable himself to do the thing before the request made, the obligation may be forfeited without any request made. *Perk. Sect.* 773: *Co.* 5, 25.

Where the thing is a duty before any request made, a request is only alleged to aggravate damages, and such request is not traversable; but, if the request makes the duty, as in *assumpsit* to do such a thing on request, there the day, &c. of the request ought to be alleged, because it is traversable. *Palm.* 389: 1 *Lutw.* 231: 2 *Lill. Abr.* 466: 4 *Cro. Car.* 280.

RESCUE.

A rescue of one apprehended for felony is felony; for treason, treason; for a misdemeanor, a misdemeanor. 1 *Hal. P. C.* 607: *Fost.* 344.

RESPONDENTIA, — See *Bottomry*.

RESTITUTION.

The original owner of goods *stolen*, who prosecutes the felon to conviction, has a right to a restitution of them, and may maintain an action of trover for them; but such action is only maintainable against the person who had possession of the goods at the time of the conviction of the thief, or afterwards, and not against any person who may, in the intermediate time, between the felony and conviction, have had possession thereof by sale in market overt, and afterwards

afterwards parted with the property. 2 *T. Rep.* 750: 2 *Inst.* 714: 3 *Inst.* 242: 5 *Rep.* 109. But, if goods are obtained by *fraud* only, the owner is not, on the conviction of the offender, entitled to restitution, against a person who has fairly acquired a right of property in them. 5 *T. Rep.* 175.

Restitution is unlawful, if it be done with intent to smother or compound the larceny, it then becoming the heinous offence of *theft-bote*. *H. P. C.* 130.

RETAINER OF GOODS. — See *Bill of Sale; Lien*.

REVERSIONS.

To ascertain the value of reversions, see *ANNUITIES*.

A reversion of an estate of inheritance may be granted by bargain and sale for money enrolled, or by release and fine. 5 *Rep.* 124: 6 *Rep.* 36: 10 *Rep.* 107.

He in reversion is entitled to an action on the case, where the tenant for life commits waste; but he cannot have an action of *trespass*, that being founded on the possession. No dower of a reversion. *Watk. Desc.*

A reversion expectant on an estate tail is not assets, or of any account in law, because it may be cut off by a common recovery, but it is otherwise of a reversion on an estate for life or years. 1 *Inst.* 173: 6 *Rep.* 38.

Persons, on whose lives lands are holden, may, by application to the Court of Chancery, be compelled to appear once a year, or be taken as dead. Also being absent seven years, they shall be so taken. *Stat.* 6 Anne, c. 18.

REVOCATION.

Uses created (as in a marriage-settlement) cannot be revoked and new ones raised without an express power in the deed, notwithstanding all parties consent.

And,

And, where a person is impowered by a deed to make a new appointment, he cannot, after making a new appointment, revoke it; unless the power given him by the first deed was a revocable power.

Letters of attorney and other authorities may be revoked, even though made irrevocable. 8 *Rep.* 82. Revocations of powers must be made after the same manner they are given; and there ought to be notice to the party. A warrant of attorney to confess a judgement cannot be revoked. 2 *Lill.* 486.

RIOTS.

The hundred is not liable in an action for damages brought by the person injured by a mob beginning to pull down his house, &c. unless the riot be of such a kind as to amount to felony within *Stat.* 1 Geo. I. stat. 2, c. 5. 7 *T. Rep.* 496.

And it is held, that the breaking of windows by a mob, because the party would not illuminate his house on a particular occasion, was held not to be within the act. *Id.*

The owners of houses may recover damages for the destruction of their *furniture*, or for any injury to their property, done at the same time that their buildings are demolished or in part pulled down. *Doug.* 673 (699).

A person present, aiding and abetting rioters, is a principal in the second degree under the statute. 4 *Burr.* 2073.

RIVERS.

The public are not entitled at common law to tow on the banks of ancient navigable rivers. The right must be founded either on statute or on usage. 3 *T. Rep.* 252: see 1 *L. Raym.* 725.

ROADS. — See *Ways.*

In the case of *Cruden v. Fentham*, tried before LORD KENYON, at Guildhall, (and not at Westminster, as stated by

by Mr. Espinasse in his Reports,) at the sittings after Michaelmas, T. 39 Geo. III. it was the opinion of his Lordship, that, in driving in the night, or on narrow roads, the respective travellers should invariably observe the rule of going to the left hand; but he thought that, in wide roads, and in the day-time, this rule was not to be so rigorously adhered to as to justify a person, where danger is probable, in asserting tenaciously the right of the road. In this case, it would be putting himself in the way of danger, and any injury would be of his own seeking. But the jury found for the plaintiff, whose servant had so acted; and, as it was a question of public convenience, the court afterwards refused to grant a rule for a new trial. *MS. and 2 Espin. Rep. 685.*

A similar rule as to ships. See SHIPS.

ROBBERY. — See Theft.

The true definition of robbery is the stealing or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party *unwillingly* to part with his property; and, whether the terror arises from real or expected violence to the *person*, or from a sense of injury to the *character*, the law makes no kind of difference; for, to most men, the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges were unanimously of opinion, that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes is a sufficient force to constitute the crime of robbery, by putting in fear. See the *opinion of the judges in Willan's case, Leach, 232.*

SAFE-

SAFE-CONDUCT.

Great tenderness is shewn by our laws not only to foreigners in distress but with regard also to the admission of strangers who come spontaneously; for, as long as their nation continues at peace with ours, and they behave themselves peaceably, they are under the king's protection; though liable to be sent home, whenever the king sees occasion. But no subject of a nation at war with us can.

SALE. — See *Bills of Sale, Contract, Horses.*

SALVAGE. — See *Insurance.*

SAMPLE. — See *Contract.*

SCHEDULE. — See *Inventory.*

SCHOOL.

Masters of grammar-schools must be licensed by the ordinary, who may examine the party applying for a license as to his learning, morality, and religion. 6 *T. Rep.* 490.

SCRIVENER. — See *Broker.*

SEA.

The main sea begins at low-water-mark; but, between the high-water-mark and low-water-mark, where the sea ebbs and flows, the common law and the Admiralty-law have *divisum imperium*, (an alternate jurisdiction,) one on the water when it is full sea, the other on the land when it is an ebb. 1 *Black. Com.* 10.

SEAMEN. — See *Maritime Courts, Ransom.*

On a case, stated for the purpose by the lords of the committee of counsel for trade and plantations, in the year

year 1789, for the opinion of his majesty's advocate, and attorney and solicitor general, they were of opinion, the first of them, that, by the ancient law of the British admiralty, the master of a merchant-ship has authority to inflict corporal punishment on any of his crew for the purpose of subordination, and to oblige them to a performance of their duty, so that it be necessary on the occasion and reasonable in the degree; and the attorney and solicitor general apprehended, that the master, by the law of England, may inflict reasonable and moderate correction for the above purpose, and that it will be matter for the discretion of a jury to determine what correction is reasonable and moderate, all circumstances considered.

FREIGHT is said to be the mother of wages; therefore, in case a loss happens to the ship, no wages are recoverable: that is, the whole voyage must be performed, or the sailors shall not be entitled to any wages; for, the ship is only entitled to freight on delivery of the cargo. And it is the same, though the voyage be to several places if the voyage be entire. 3 Burr. 1844.

And, on this principle, where no freight is earning by the ship, the mariners have no title to wages; therefore, while a ship is lading or unlading, the sailors are not entitled to wages, unless there is a special agreement to that effect. 1 Str. 405.

And the case is the same of *letters of marque* and *privateers*. Doug. 520.

Though the officers and men give bond not to demand wages unless the ship returns to London, yet, if she arrive at a delivering-port, and afterwards is taken by an enemy, they will be entitled to their wages to the delivering-port.

If a ship be lost before she arrives at any port of delivery, the seamen lose all their wages; but, if she be lost after coming to a port of delivery, they only lose their wages from the last port of delivery. If they run away, though
after

after coming to a port of delivery, they lose all their wages. 1 *L. Raym.* 639.

By 3 and 4 Anne, c. 9, c. 16, all suits in the admiralty for seamen's wages shall be commenced within six years after the cause of action.

It is an indulgence that the courts at Westminster permit mariners to sue for their wages in the Admiralty-court, because they may all join in suit. But this indulgence is not permitted to the master of the ship. 1 *L. Raym.* 576. But it is to a mate. *Id.* 398, 632.

If a sailor, hired for a voyage, take a promissory-note from his employer for a certain sum, provided he proceed, continue, and do his duty, on-board for the voyage; and, before the arrival of the ship, he die; no wages can be claimed either on the contract or on a *quantum meruit*. 6 *T. Rep.* 320.

As the Court of Chancery will set aside unconscionable bargains made with heirs, so it will, upon principles of public policy, set aside unreasonable bargains made with seamen for prize-money or wages. 2 *Vez.* 281, 516: 1 *Wils.* 229.

SEARCH-WARRANTS.

Search-warrants, if issued on proper application, are legal, but must issue under restrictions. As, 1, there must be an oath; 2, the grounds of suspicion declared; 3, it must be executed in the day-time; 4, by a known officer; 5, in the presence of the party informing. And, though all these precautions are observed, the person, on whose suggestion and information the warrant issued, is liable to an action of trespass, if nothing be found, for breaking and entering the house; for, he is justified or not by the event. *Hale's P. C.* 150.

SECURITIES FOR MONEY.

It is said that, if a security be given to pay a gross sum, £100 for instance, at five several days, an action will not lie for any part till the last day be past. It may, therefore, be most prudent to name the respective days on which the payments are to be severally made; and to add a clause, that, if nonpayment of either of the sums on the specified days should happen, the whole should immediately become due.

If two or more join in a security, and are only jointly bound or engage themselves, an action can only be brought against them both; which makes it proper that they should be severally as well as jointly bound, which entitles the creditor to an action against both or either, which is frequently a point of great consequence.

The best personal security that can be given, by a debtor to a creditor, is a warrant of attorney to confess a judgment with a release of errors: but this, like all others, is subject to failure, to prevent which, it may be necessary that it should be immediately entered up. It is conceived, however, that a very improper use is sometimes made of this security, which those who are unacquainted with its nature and consequences should be guarded against. And this may be best done by stating briefly its nature and consequences; which are, that by this means the debtor and creditor are put into the same plight as they would have been, had the creditor commenced an action against the debtor, and obtained a verdict against him; and, consequently, the debtor, without he guard carefully against it, may expose his whole property to the ravages of an execution, and his person to the horrors of a jail.

In mortgages and such like securities it is prudent to name a place in the condition where the money borrowed shall be repaid; for, if no place be mentioned for payment of money,

money; the obligor must at his peril find out the obligee or mortgagee; but, where a place is appointed, he need seek no farther.

Bonds are much to be preferred to mere notes, where they are intended as standing-securities; for, 1. the remedy on them for the recovery is more simple, less expensive, and, in some instances, more expeditious, than on notes or other such like securities. 2. Bonds, in case of the death of the debtor, are preferred in payment to simple-contract debts, such as notes, book-debts, &c. 3. As the heir is bound, not only the *personal* but the *real* property is liable, whether it be in the hands of the heir by descent or of a devisee.

A. stands indebted to B. and B. to C.; B. may make a security to C. of the debt due to him from A. by an assignment of it to C. with power to sue in the name of B. And this assignment will bind A. if he has proper notice of the assignment; which C. must take care to give him, by reading over the assignment to him in presence of one or two witnesses.

If a man enters voluntarily into a bond, though there was no consideration, yet, if there was no fraud used in obtaining it, the bond shall not be relieved against in equity.
1 *Chan. Rep.* 157.

SEDUCTION.

It seems to be a remarkable omission in the law of England, which with such scrupulous solicitude guards the rights of individuals, and secures the morals and good order of the community, that it should have afforded so little protection to female chastity. It is true that it has defended it by the punishment of death from force and violence, but has left it exposed to perhaps greater danger from the artifices and solicitations of seduction. In no case whatever,

unless she has had a promise of marriage, can a woman herself obtain any reparation for the injury she has sustained from the seducer of her virtue. And, even where her weakness and credulity have been imposed upon by the most solemn promises of marriage, unless they have been overheard or made in writing, she cannot recover any compensation, being incapable of giving evidence in her own cause. Nor can a parent maintain any action in the temporal courts against the person who has done this wrong to his family, and to his honour and happiness, but by stating and proving, that, from the consequences of the seduction, his daughter is less able to assist him as a servant, or that the seducer, in the pursuit of his daughter, was a trespasser upon his premises. Hence no action can be maintained for the seduction of a daughter, which is not attended with a loss of service or an injury to property. Therefore, in that action for seduction which is in most general use, viz. a *per quod servitium amisit*, the father must prove, that his daughter, when seduced, actually assisted in some degree, however inconsiderable, in the housewifery of his family; and that she has been rendered less serviceable to him by her pregnancy; or the action would probably be sustained upon the evidence of a consumption, or any other disorder, contracted by the daughter in consequence of her seduction, or of her shame and sorrow for the violation of her honour. It is immaterial what is the age of the daughter, but it is necessary that, at the time of the seduction, she should be living in, or be considered part of, her father's (or mother's) family. 4 Burr. 1878: 3 Wils. 18. And Mr. Justice Wilson, in a case upon the northern circuit, was of opinion, that a young woman, who was upon a visit at a relation's house, and was there seduced, might be considered, in support of this action, as in the service of her father, or as part of his family. In this action, as the daughter does not necessarily receive any part of the dama-

ges recovered, she is a competent witness, and is generally produced to prove the fact of the seduction. But, in such cases, as in actions for adultery, the damages are estimated from the rank and situation of the parent, or from the degree of affliction which, under all the circumstances, he may be supposed to suffer. 3 *Black. Com.* 142, n.

It should seem, that this action may be brought by a grand-father, brother, uncle, aunt, or any relation, under the protection of whom, *in loco parentis*, a woman resides; especially if the case be such, that she can bring no action herself. But the courts would not permit a person to be punished twice by exemplary damages for the same injury. 2 *T. Rep.* 4.

In the action of trespass, which may be brought when the seducer has illegally entered the parent's house, the debauching the daughter is stated and proved as an aggravation of the trespass. 2 *T. Rep.* 166. And, in this action, the seduction may be insisted on, though it may not have been followed by the consequences of pregnancy or the loss of service.

SERVANTS. — See *Masters and Servants*.

On commissions of bankruptcy, servants are paid one year's wages *in toto*; for all the rest, they come in with the other creditors.

If one retain a servant generally without expressing any time, the law construes it to be for a year, according to the statute. And, if the servant retained for a year falls sick, &c. the master cannot put him away or abate his wages. If a servant refuses to do his business, it is in law a departure from his service. If a man retain a servant for so much wages, if he departs within the year, he can have no wages: but, when a master is dead, the servant is legally discharged. And it is a reasonable cause of departure from

service, if the servant is not allowed sufficient meat, &c. or if his master's wife beats him. If any person entices away a servant, or hires him knowing him to be a servant to another, the master may have action on the case against him. 1 *Inst.* 42: *Noy's Max.* 90, 91: *F. N. B.* 168: 2 *Leon.* 63.

The statute for regulating wages of servants does not extend to coachmen, footmen, or other servants than in husbandry. 6 *T. Rep.* 583: *See Cald.* 14.

If, by the malfeasance of a servant, the goods of his master are injured, an action of trespass lies; but, if by his neglect, an action on the case. *Bro. Tres. Pl.* 295: *L. Raym.* 188.

If a servant retained, though not for a year, be beaten so as to be less capable of doing his master's business, an action of trespass lies; but, where the servant is not retained, but serves during pleasure, an action of case. *Bro. Cas. Pl.* 55: 2 *Roll. Abr.* 552.

If a servant, hired for a year, be taken ill, the master is bound to provide for and take care of the servant, and cannot deduct wages in proportion to the time lost. 3 *Burn.* 452.

A master may turn away a servant for incontinence or moral turpitude; for, such misconduct produces a dissolution of the contract. *Cald.* 14.

By the *Stat.* 39 Geo. III. c. 85, if any servant or clerk shall, by virtue of his employment, receive any money, bills, or any valuable security or effects, in the name or on the account of his master or employer, and shall afterwards embezzle any part of the same, he shall be deemed to have feloniously stolen the same, and shall be subject to transportation for any term not exceeding fourteen years.

The laws of England take notice of five kinds of servants; viz. 1. *Menial* or *domestic* servants, from their being employed about the *household* concerns. 2. *Apprentices*; as to which see that article *ante*. 3. *Labourers*, concerning whom

whom there are many excellent regulations by our statute-law. 4. *Stewards, factors, and bailiffs*; as to whom, see the articles AGENT, FACTOR. 5. *Journeyman*; concerning whom, see that article.

By service, all servants and labourers, except apprentices, become entitled to wages: according to their agreement, if menial servants; or, according to the appointment of the sheriff or sessions, if labourers or servants in husbandry; for, the statutes for regulation of wages, in strictness, seem to extend to such servants only; and the reason given is, that it is impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages. It has indeed been the practice of justices in disputed cases to assess the wages of both kinds, a practice which it was conceived might be supported under *Stat. 20 Geo. II. c. 19*; but it has been lately determined, that the authority of the magistrates, under the *Stat. 5 Eliz. c. 4*, is confined to servants employed in husbandry. 6 *T. Rep. 583*.

SET-OFFS. — See *Mutual Debts*.

SHERIFFS.

The *Stat. 3 Geo. I. c. 5*, for the regulation of the office of sheriffs, enumerates twelve cities and five towns, which are counties of themselves, and which have consequently their own sheriffs. The cities are London, Chester, Bristol, Coventry, Canterbury, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester, York. The towns are Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Poole, Southampton.

SHIPS. — See *Bill of Sale*.

A master of a ship hath no property, either general or special, in his being constituted; though the law considers

him as an officer, who must render an account for whatsoever is put into his custody; and, therefore, for whatever misfortunes happen, or losses arise through negligence, wilfulness, or ignorance, in himself or mariners, he is answerable. *Hob.* 11.

The master of a ship, at his peril, must see that all things be forthcoming which are delivered to him, let what accident soever happen; (the act of God, of an enemy, and the perils and danger of the sea, only excepted;*) but, for fire, thieves, and the like, he must answer: and he is in the nature of a common carrier; and, though he receives a salary, yet is a known and public officer, and one that the law looks upon to answer: and the plaintiff has his election to charge either master or owners, or both, at his pleasure, though he can have but one satisfaction. *Cro. Jac.* 330, 331: See *Balm. on Bailm.* by Jones, 106 [107]: 1 *Sid.* 36: 4 *Rep.* 84: 1 *Mod.* 285: 2 *Keb.* 866: 3 *Keb.* 72, 112, 132: 3 *Lev.* 258, 259.

A master of a ship may keep the goods till he is paid his freight; but, if he once parts with them, he cannot retake them. 12 *Mod.* 511.

The master of a ship, buying provisions for the ship, and having money from the owners to pay for provisions, if, nevertheless, he takes them upon credit, and fails; the owners are liable. 2 *Vern.* 643.

The repairer of a ship has his election to sue the master who employed him or the owners; but, if the work is undertaken on a special promise from either, the other is discharged. 2 *Str.* 816.

By 26 Geo. III. c. 60, sect. 17, (Lord Hawkebury's Act,) a bill of sale of a ship must recite the certificate of

* And, even if lost at sea, he will be answerable, if any neglect appears; as, if the master should be absent, and it should appear that the vessel might have been saved, had he been present, and the utmost possible exertions used.

the registry, notwithstanding the bill of sale is only intended as a security for money lent. 3 *T. Rep.* 406.

Two partners purchased a ship under a regular bill of sale, conformable to the above statute; they afterwards took in two other partners, who paid for their respective shares in the ship; but there was no transfer to them under the direction of the statute: and it was held, that the four partners had not an insurable interest in the freight; for, as the right to freight results from the right of ownership, these four partners had not shewn in themselves, jointly, (as laid in the declaration,) either a legal or equitable title to the ship. 5 *T. Rep.* 709.

If a ship be in a river or harbour, and money be laid out there, either in repairing, fitting out, new rigging, or apparel for the ship, this is no charge upon the ship. But, if the ship be repaired in a foreign port, while out on a voyage, as no treaty or contract can be made with the owner, and the master employs any one to do work on the ship, or to new rig or repair the same, this, for necessity and encouragement of trade, is a lien on the ship; and the master, by the maritime law, is allowed to hypothecate the ship. 2 *P. Wms.* 367: *Atk.* 234, *pl.* 128.

The captain of a ship has no lien on the ship for wages, stores, or repairs, done in England. 1 *Doug.* 101.

As there are rules of the road for the security of carriages, &c. so there are rules for the passage of ships by each other; for, it was determined before Mr. Justice Buller and a special jury of merchants, at Guildhall, July 14, 1787, that, where a ship, coming up the channel with the wind north by west, is kept close by the wind, with her larboard tacks on-board, it is the duty of any other vessel, which has the wind at large, to pass her to leeward, and not to dispute the wind with her; it being a loss to a ship, going to windward, to be obliged to bear away, but none to a vessel going to leeward. And that, as (in this case) the

the accident happened by one vessel, with the wind on the starboard beam, striking against another while she was close-hauled on the larboard-tack, and her sails shivering, she was responsible for not having put her helm up, and passing her to the leeward.

When two ships accidentally, and without any negligence, mismanagement, or design, on either side, run foul of each other, they must equally bear the damage which arises; but, in case the damages done to one of them should exceed the value of the other, no claim can extend farther than the produce of the whole; so that the owners, by giving up what was theirs, are exempted from any farther demands.

If a ship is riding in a gale of wind, and the cables part, the loss falls on the owners; for, the underwriters are not liable to pay for wear. But it is otherwise, where the vessel, being at anchor, drives, and they are cut away to save the ship. *MS.*

Wilfully to cut away, burn, or destroy, any ship is a capital felony, in any captain, master, mariner, or other officer, belonging to the ship so destroyed. 1 Anne, stat. 2, c. 9, sect. 4: 4 Geo. I. c. 12, sect. 3: 11 Geo. I. c. 29. So, if any person bores holes in a ship in distress, or steals a pump belonging thereto. 12 Anne, stat. 2, c. 18: 4 Geo. I. c. 12.

By 26 Geo. II. c. 19, persons, convicted of stealing goods from a ship wrecked or in distress, or of obstructing the escape of any person from the wreck, or of putting out false lights to lead such ship into danger, shall suffer as felons without benefit of clergy; but, where goods of small value are stolen, without any circumstances of cruelty, the offender may be indicted for petty larceny.

Persons, in whose custody shipwrecked goods are found, not giving a satisfactory account, shall be committed to the common

common jail for six months, or pay treble the value of such goods. *Id.*

Goods offered to sale, suspected of being shipwrecked, shall be stopped; and the person, so offering them, and not giving a satisfactory account, shall be committed for six months, or pay treble the value of such goods. *Id.*

And persons convicted of assaulting any magistrate or officer, when in discharge of his duty, respecting the preservation of any ship, vessel, goods, or effects, shall be transported for seven years. *Id.*

SLANDER.

If *Alfred* comes to *Elfric* to ask his opinion of any one he wishes to employ or take into his service, it is a rule that *Elfric* shall not be liable to an action for giving (in this sort of confidence) his free and undisguised opinion of the party. *Buller, Trin. 1783, sittings after Term.*

A justification must be pleaded specially. *Str. 1200.*

In actions for words with special damage laid, and verdict for one shilling, if the words are in themselves actionable, no more costs than damages shall be recovered; but, if otherwise, full costs. *2 Black. Rep. 1062.*

If one is possessed of an estate, an action lies for saying he has no right to it. *4 Co. 18.* But not, if, at the same time, the speaker says, it is his. *4 Co. 17, a. 18, b.* Yet, if it be asserted that a third person has such a right, it is actionable; but not without some special damage is received. *Cro. Jac. 164: Cro. El. 197.*

Though all the actionable words, laid in any one count of a declaration, are not proved, yet, if some are, the plaintiff shall have a verdict. *2 Black. Rep. 790.*

If the justification be local, as that he stole plate at *Oxon*, the trial ought regularly to be in the same county. *Bull. N. P. 10.* But this would be aided after verdict by *16 and 17 Car. II, c. 8.*

The

The Statute of Limitations, as to actions of slander, does not extend to cases where special damage is the gist of the action. *Bull. N. P.* 11. But, where the words are in themselves actionable, special damages will not take them out of the statute. *Ib.*

It is no justification to an action of slander to plead and prove that A. B. told the slander to the defendant. 7 *T. Rep.* 17. But, if the person, repeating the slander, at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action against the former. *Ibid.* The reason assigned in 12 *Co.* 134, is, that, if the author had been named, his credit might have been in so low estimation that the party might have suffered no injury from the slander. And Lord Kenyon adds, "It is just that, when a person repeats any slander against another, he should at the same time declare from whom he heard it, in order that the party injured may sue the author of the slander." 7 *T. Rep.* 17.

When words, that are actionable in themselves if unexplained, are accompanied by qualifications and allusions, which prove that the meaning of them is such, that, even if they were true, they would not subject the person of whom they are spoken to any punishment or penalty, they are not slanderous. As to say a man is a thief because he has stolen a cat, the stealing of which is not a felony; or to charge a lady with theft or murder, where the accusation is intended as a compliment, and alludes only to the fascinating or fatal influence of her beauty. — There are only three disorders which the law deems it scandalous to report that a person labours under, viz. the plague, the leprosy, and the *lues venerea*. — *Com. Dig. Aff. Def. D.* 28.

As the danger, arising from infection in those diseases, is the ground of action, it is not actionable to say a person has

has had such a disorder, the infection of which may long have been removed. 2 *T. Rep.* 473: 2 *Str.* 1189.

SMUGGLING.

If one of two partners advance a sum of money in a smuggling transaction, or suffer loss by it, he cannot recover a proportion of it against his partner, because the transaction is prohibited. And, where a contract is made for smuggled goods, a party cannot come into a court of justice to recover on it. *MS.* — But it is otherwise as to foreigners who reside abroad; for, they are not bound to take notice of the revenue-laws of any other country. *Cowp.* 341. But, though one party cannot recover against the other on the contract itself, yet, if he come to rescind the contract, he may recover back so much money as has been paid. *Doug.* 465. — The same law as to all other illegal contracts.

And no action will lie for the sale of smuggled goods abroad, if the seller knew that they were to be smuggled into this country, and assisted in the packing for that purpose, although the foreign vender was to run no risk; but, where the feller is not concerned in the fraud, and the goods were delivered there in the fair course of trade, he may recover. 3 *T. Rep.* 454: 4 *T. Rep.* 466: 5 *T. Rep.* 599: 1 *Espin. Dig.* 91.

An action *on the case* lies for maliciously obtaining or executing a warrant to search a house for smuggled goods where none such are found; but an action of trespass does not lie against excise-officers, who enter into a person's house, by virtue of a legal warrant, to search for smuggled goods, although none such be found therein. 1 *T. Rep.* 535, n.

By *Stat.* 24 *Geo. III.* c. 47, and the excise-laws, the forfeiture of a vessel attaches the moment an act of smuggling

gling is done ; so as to avoid mesne incumbrances or alienations between that time and the time of condemnation. But the crown is not entitled to the immediate earnings of the vessel. Neither is the actual property of the vessel altered till after the seizure, though it may be before condemnation. 1 *T. Rep.* 260.

Custom-house-officers may seize for the forfeiture within three years after the fact committed ; and the attorney-general may file an information at any time whilst the ship is in being. 1 *T. Rep.* 261.

STAGE-COACHES. — See *Carriers*.

If a person takes a place in a stage-coach, and pays at the time only a deposit, as half the fare, for example, and is not at the inn ready, his place may be filled up with another passenger ; but otherwise, if he pays the whole fare ; for, then, he may be taken up at any stage of the journey. 1 *Espin. Rep.* 27.

STAMP-DUTIES. — See *Bills of Exchange, Letters, Notes of Hand*.

By *Stat.* 37 Geo. III. c. 136, any instrument, matter, or thing, (except bills of exchange, promissory-notes, or other notes, drafts, or orders,) liable to be stamped with a stamp of a particular denomination or value, and whereon there shall be impressed any stamp of a different denomination, but of an equal or greater value with the stamp required, may be brought to the proper stamp-office, and, upon payment of the duty, and one penalty of £ 5, be stamped with the proper stamp, but without any allowance for the wrong stamp.

And, where such instrument shall be brought to be stamped after executed, the same not being stamped with any stamp, or stamped with a stamp of less value than is required,

required, it may be stamped on payment of a penalty of £10, besides the duty, for each skin.

And, where it shall appear, on oath or otherwise, that any instrument hath not been engrossed on parchment, &c. duly stamped, either by accident or inadvertency, or from urgent necessity or unavoidable circumstances, and without any intention to defraud, and it be brought to the commissioners within sixty days after execution, the penalty may be remitted.

Where a paper, purporting to be an agreement, is entered into out of England, and an action brought upon it, and the plaintiff declares on it as an agreement, it need not be stamped. 1 *Espin. Rep.* 311.

Certain agreements between merchants who live fifty miles from London are exempted from stamps.

A paper, containing the letters and words "I. O. U. eight guineas," and signed by the party, is good, as an acknowledgement of a debt without a stamp. 1 *Espin. Rep.* 426.

A stamp of a different kind than that directed by the statutes will not be valid, though of equal or greater value. 1 *Espin. Rep.* 243: *see the statute ANTE.* — And articles of agreement sealed cannot be given in evidence, unless stamped with a deed-stamp. 6 *T. Rep.* 317.

A surrender of a lease for years may be in writing without deed, seal, or stamp. *Will.* 26. So may a term of years be assigned; but, if by deed, it must be stamped. *Burr.* 2832.

A broker, when he bought goods for his principal, agreed for a half *per cent.* to indemnify him from any loss on the re-sale: it was held, that this agreement, if reduced to writing, need not be stamped, under *Stat.* 23 Geo. III. c. 58; it being a contract relating to the sale of goods, which, by sect. 4 of that statute, is exempted. 3 *T. Rep.* 524.

An

An agreement made at sea, or any where out of the kingdom, may be given in evidence without being stamped. 1 *Espin. Rep.* 311.

If an instrument, executed abroad, requires a stamp by the laws of the country where it was executed, a party cannot sue on it here, unless it has the stamp required in the country where it was executed. 2 *Espin. Rep.* 528.

An agreement between merchants, that one shall take a share in the outfit of a ship and adventure, is not an agreement for the sale of goods, and therefore requires a stamp. *Id.* 403.

Where a note has been given for goods sold, and, wanting the proper stamp, cannot be given in evidence, and the declaration contains the usual counts, the party may go into evidence of the goods sold, for which the note was given. *Id.* 245.

To prove the dissolution of a partnership, a copy of the agreement to dissolve it, inserted in the Gazette, is not evidence, unless it is stamped; for, it is offered in evidence of an agreement. *Id.* 283.

An agreement for a lease of premises, though under the annual rent of £5, requires a stamp, if the interest be a beneficial one. 2 *Espin. Rep.* 595.

Any alteration in an instrument requiring a stamp makes it a new instrument, and a new stamp is necessary. 1 *Espin. Rep.* 81.

STEALING. — See *Theft*.

STEWARD. — See *Agent*.

STOCKS. — See *Bank*.

The following table is constructed to shew the comparative value of the different stocks, and to ascertain the value of real estates, when compared with the state of the funds.

It

It shews the exact proportional value which the different stocks and annuities ought to bear to each other, according to their several rates of interest, supposing the security equal, and not to be reduced at any given period; the number of years' purchase land should sell for in the same proportion; and also what interest per cent. per annum is produced by money laid out at the several rates expressed, by which may be seen the most advantageous method of investing money in public or private securities.

Consols. Reduced. South Sea Annuities Imperial and American Stocks.	South-Sea Stock and Irish Stock.	English and Irish Stock.	4 per Cent 4½ per C.	5 per Cent 5½ per C.	6 per Cent 6½ per C.	Irish Bank Stock.	English Bank Stock.	8 per Cent 8 per Cent 10 per C.	Irish Royal Exchange Insurance Shares.	India Stock.	Years Purchase of Land, or Long Annuities	Interest gained per Annum.
3 per Cent 3½ per C.	3½ per C.	4 per Cent 4½ per C.	5 per Cent 5½ per C.	6 per Cent 6½ per C.	7 per Cent 7½ per C.	8 per Cent 8 per Cent 10 per C.	9 per Cent 9 per Cent 10 per C.	10 per C.	10½ per C.	11 per C.	12 per C.	£. s. d. J.
30 31½	35 36½	40 42	45 47½	50 52½	55 57½	60 63	65 68½	70 73½	80 84	90 94½	100 105	10 0 0 9 10 5 3
33 34½	38½ 40½	44 46	49½ 51½	55 57½	60½ 63½	66 69	71½ 74½	77 80½	88 92	99 103½	110 115	9 1 9 3 8 13 10 3
36 37½	42 43½	48 50	54 56½	60 62½	66 68½	72 75	78 81½	84 87½	96 100	108 112½	120 125	8 6 8 8 0 0
39 40½	45½ 47½	52 54	58½ 60½	65 67½	71½ 74½	78 81	84½ 87½	91 94½	104 108	117 121½	130 135	7 13 10 7 8 1 3

Consols. Reduced. South-Sea Annuities Imperial and American Stocks.	South-Sea Stock and Irish Stock	English and Irish Stock.	4 per Cent 3½ per Cent	Navy and Irish Stock.	5 per Cent 5½ per Cent	Grand and Royal Canal Royal Exchange Insurance Shares.	Irish Bank Stock.	English Bank Stock.	7 per Cent 8 per Cent	Irish Royal Exchange Insurance Shares.	India Stock.	Years Purchase of Land, or Long Annuities	Interest gained per Annum. £. s. d. f.
42 43½	49 50½	56 58	63 65½	70 71½	77 79½	84 87	91 94½	98 101½	112 116	126 130½	147 152½	14 14½	7 2 10 1 6 17 11
45 46½	52½ 54½	60 62	67½ 69½	75 77½	82½ 85½	90 93	97½ 100½	105 108½	120 124	135 139½	157½ 162½	15 15½	6 13 4 6 9 0 2
48 49½	56 57½	64 66	72 74½	80 82½	88 90½	96 99	104 107½	112 115½	128 132	144 148½	168 173½	16 16½	6 5 0 6 1 2 2
51 52½	59½ 61½	68 70	76½ 78½	85 87½	93½ 96½	102 105	110½ 113½	119 122½	136 140	153 157½	178½ 183½	17 17½	5 17 7 3 5 14 3 2
54 55½	63 64½	72 74	81 83½	90 92½	99 101½	108 111	117 120½	126 129½	144 148	162 166½	189 194½	18 18½	5 11 1 1 5 8 1 1
57 58½	66½ 68½	76 78	85½ 87½	95 97½	104½ 107½	114 117	123½ 126½	133 136½	152 156	171 175½	199½ 204½	19 19½	5 5 3 0 5 2 6 3
60 61½	70 71½	80 82	90 92½	100 102½	110 112½	120 123	130 133½	140 143½	160 164	180 184½	210 215½	20 20½	5 0 0 0 4 17 6 3
63 64½	73½ 75½	84 86	94½ 96½	105 107½	115½ 118½	126 129	136½ 139½	147 150½	168 172	189 193½	230½ 235½	21 21½	4 15 2 3 4 13 0 1

66	77	88	99	110	121	132	143	154	176	198	210	231	22	4 10 10 3
67	78	89	101	111	122	133	144	155	180	202	221	230	23	4 8 10 3
69	80	91	103	115	126	138	149	161	184	207	230	241	23	4 6 11 1
70	81	92	105	117	129	141	152	164	188	211	235	246	23	4 9 11 1
72	83	94	108	120	132	144	156	168	192	216	240	252	24	4 3 4 0
73	84	95	110	122	134	147	159	171	196	220	245	257	24	4 1 7 2
75	86	97	112	125	137	150	162	175	200	225	250	262	25	4 0 0 0
76	87	98	114	127	140	153	165	178	204	229	255	267	25	3 18 5 0
78	89	100	117	130	143	156	169	182	208	234	260	271	26	3 16 11 0
79	90	101	119	132	145	159	171	185	212	238	265	278	26	3 15 5 3
81	91	102	121	135	148	162	175	189	216	243	270	283	27	3 14 0 3
82	92	103	123	137	151	165	178	192	220	247	275	288	27	3 12 8 3
84	93	104	126	140	154	168	182	196	224	252	280	294	28	3 11 5 0
85	94	105	128	142	156	171	185	199	228	256	285	299	28	3 10 2 0
87	95	106	130	145	159	174	188	203	232	261	290	304	29	3 8 11 2
88	96	107	132	147	162	177	191	206	236	265	295	309	29	3 7 9 2
90	97	108	135	150	165	180	195	210	240	270	300	315	30	3 6 8 0
91	98	109	137	152	167	183	198	213	244	274	305	320	30	3 5 6 3
93	99	110	139	155	170	186	201	217	248	279	310	325	31	3 4 6 1
94	100	111	141	157	173	189	204	220	252	283	315	330	31	3 3 5 3
96	102	112	144	160	176	192	208	224	256	288	320	336	32	3 2 6 0
97	103	113	146	162	178	195	211	227	260	292	325	341	32	3 1 6 2
99	105	115	148	165	181	198	214	231	264	297	330	346	33	3 0 7 1
100	106	116	150	166	183	200	216	233	266	300	333	350	33	3 0 0 0

EXAMPLE. — If, on examining the price of stocks, I find £100, 3 per Cents, can be bought for £48, and that £100, 5 per Cents, sell for £95, it is clearly my advantage, if I am a holder of 5 per Cents, to sell them, and buy 3 per Cents; because, it appears by the Table, that at £95 per cent. they produce only £5 : 5 : 3 per annum; whereas, the 3 per Cents, at £48 per cent. produce £6 : 5 per cent. per annum.

But, if I am a holder of 3 per Cents when the price is £48 per cent. and I can buy £100 of 5 per Cents for £75, it is my advantage to sell my 3 per Cents and buy 5 per Cents; because the 3 per Cents, as I find by the Table, produce at that rate only £6 : 5 per annum, whereas the 5 per Cents produce £6 : 13 : 4 per annum.

And if land is at 14 years purchase, it is better for me to sell my stock and to purchase land, because at that rate it yields £7 : 2 : 10 per cent.

Again. — Three per Cent. Consols are at £66; (that is, a purchaser must give £66 for £100 stock in that fund, the value of which is £60 to pay £5 per cent.;) at the same time 4 per Cents are at £82½: — in order to determine which is best to purchase, refer to the Table; and, in the first column, under 3 per Cents, find £66; and, on the same line in the third column, under 4 per Cents, is £88, the proportionable rate: and, as the price is only £82½, there appears a gain of £5 : 10 on every £100 of stock, by purchasing in the 4 per Cents.

It may be necessary to observe, that the interest of the stock of a trading company is subject to increase or decrease, according to the profit or loss of such company; consequently, the price of the stock may not be in proportion to government securities, but rise or fall agreeably to opinion and expectation of increase or decrease of dividend.

Thos.

Those annuities which are, on comparison, found lowest by producing the greatest interest, and not being subject to any particular contingency, must be the best for any person to purchase, who has no intention to commence jobber or dealer in stocks.

N. B. — In case the interest of the capital stock, belonging to any of the public companies, should be declared more or less than the calculation is made from in the Tables, nothing more will be required than to add to or subtract from the comparative rate in the Tables; in like proportion as the increase or decrease of dividend.

An action will lie against the Governor and Company of the Bank of England for refusing to permit a transfer of stock to be made; but the court will not, in such a case, grant a mandamus. *Doug. 524.*

STOCK-JOBGING.

If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the difference, and one of them repay the broker the whole sum, *with the privity and consent of the other*, he may recover a moiety from that other, notwithstanding the *Stat. 7 Geo. II. c. 8.* which avoids and declares illegal all stock-jobbing transactions. *See 3 T. Rep. 418.*

But, in such a case of an illegal transaction, if one partner pay money for another, *without an express authority*, he cannot recover it back. *Ibid.*

Where persons, engaged in stock-jobbing, are also concerned in making real transfers of stock, and the balance is paid upon the whole by one for both of them, a moiety of the money paid on the real transactions may be recovered, even under circumstances in which the other part could not. *Ibid.*

STOLEN GOODS, NOTES, &c. — See *Bills of Exchange, Finding, Markets.*

STOPPAGE. — See *Mutual Debts.*

STOPPING GOODS *in Transitu.* — See *Contract, Bills of Lading.*

When a man sells goods, he sells them on the credit of the buyer; if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately becomes a bankrupt. But, where the delivery is to be at a distant place, as between the seller and buyer, the contract is ambulatory till delivery; and, therefore, in case of the insolvency of the buyer in the mean time, the seller may stop the goods *in transitu.* 2 *T. Rep.* 63.

A seller of goods, before actual possession by the buyer, has a lien upon the goods he sends; and, if he can get them before that possession is obtained, where the buyer is bankrupt, he has the benefit of that lien. *Cowp.* 296.

Where goods are consigned to A. and, on his becoming a bankrupt, his assignee went to the inn where they were arrived and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt: in this case, the consignor could not afterwards stop them, because they were not then *in transitu.* 3 *T. Rep.* 464.

A consignor's right of stopping goods *in transitu* is not taken away by the consignee's having partly paid for the goods; for, the seller has a right to retake them, unless the whole price has been paid. 7 *T. Rep.* 440.

A composition with creditors is good evidence of insolvency. 5 *T. Rep.* 36, 218. And an insolvency subsequent to the contract is a good defence against the delivery of goods in an action for the non-delivery, pursuant to the agreement.

agreement. But if, after the intervention of insolvency, the goods are delivered without demanding the price, they cannot be recovered back. *Idem.*

A. agreed to buy some articles of plate of B. who was to get A.'s arms engraven on them, and to pay for the engraving; and it was held, that a delivery to the engravers for that purpose was not a delivery to A. so as to defeat B.'s right of stopping the goods *in transitu*, the price of the goods not being paid by A. 7 *T. Rep.* 64.

STRAY. — See *Finding*.

SUNDAY.

A sale of goods on this day in a market overt is not good to alter the property of goods. *Jac. L. Dist. v. Sunday.*

SURETY.

One surety may compel another in equity to contribute towards payment of a debt for which they were jointly bound. *Toth.* 41: 2 *Freem.* 97.

By Magna Charta, c. 8, sureties are not liable, if the principal be responsible; but this does not extend to sureties in a bond, covenant, or note; for, they are bound equally with the principal. *Hardres*, 378.

Where a bond, conditioned for the re-payment of a sum of money by a principal and surety, has not been forfeited till after the bankruptcy of the surety, the debt cannot be proved under his commission; and, therefore, he may be sued upon it notwithstanding his certificate, the debt as to him being contingent. *Doug.* 160.

So, where a man becomes bail for another, it is considered as a contingent debt; and, if the bail commit an act of bankruptcy before the judgement, it cannot be proved under the commission. 2 *Str.* 1043. But he has an equity

to make the creditor prove in trust for him before he pays.
1 *Cooke's B. L.* 210 : 3 *Vez. jun.* 243.

In bills of exchange and promissory-notes there is a double contract; the first between the principal debtor and creditor, and also an implied contract, that the principal debtor will indemnify the surety; so that, if the creditor, the indorsee, comes upon the surety, the indorser, the indorser or his assignees may come in and prove under a bankruptcy against the original principal debtor. But this must depend upon the time when the surety paid the debt, 1 *Atk.* 123. For, where a surety for a debt pays off part subsequent to an act of bankruptcy committed by the principal, but prior to the creditor's proving his debt under the commission, the creditor cannot prove the whole debt and stand as a trustee for the surety; neither can the surety himself prove, because, as to him, it became a debt subsequent to the bankruptcy. 1 *Cooke's B. L.* 153.

If a person gives an absolute bond to another who became surety for him, it is a good consideration for the bond, and the obligee is entitled to prove it as a debt under the commission, although he has not himself paid the money at the time. 2 *T. Rep.* 97, 640.

A surety in a bond, who pays the debt after the bankruptcy of the principal, is not barred by the certificate, though the bond was forfeited before the bankruptcy. *Cowp.* 525.

The rule of law is, that, although a party make himself liable for the debt of another by a contract, prior to the bankruptcy of such other person, and he does not actually pay that debt till after the commission of bankruptcy, he cannot prove his debt under the commission. 1 *T. Rep.* 599.

Where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is to be considered as money paid and advanced to the use of the principal debtor, and may be recovered against him, even

even though he did not pay it by the desire of the principal. 2 *T. Rep.* 105: 8 *T. Rep.* 310. The first case of this kind in which a plaintiff succeeded was tried before the late Mr. Justice GOULD, at Dorchester.

One surety may compel another in equity to contribute towards payment of a debt for which they are jointly bound. *Toth.* 41: 2 *Freem.* 97.

A surety has a right, the day after a bond in which he joins becomes due, to apply to a court of equity, and insist upon the bond being put in suit, so that he may be delivered from the obligation. And, upon the same principle, it is held, that, if the creditor give the principal debtor time beyond the term originally stipulated in the bond, without the surety's consent, the surety is discharged. 2 *Vez. jun.* 540: 2 *Bro.* 579. So, if the creditor sues the principal by direction of the surety, but, without his privity, agrees to stay execution, the surety is discharged. 2 *Vez. jun.* 541.

A contract cannot be carried beyond the strict letter of it as against a surety. 2 *T. Rep.* 360.

Where John, at the instance of Peter, becomes a joint security for Robert, and Peter is obliged to pay the whole money, Peter cannot call on John for contribution of a moiety. But it would be otherwise if John becomes a surety of his own motion. 2 *Espin. Rep.* 478: *Toth.* 41: 2 *Freem.* 97.

TEMPEST. — See *Repairs, Ship.*

TENANT. — See *Landlords and Tenants, Tenure, Rent.*

The executors of a tenant for life, of himself, or of another, is entitled to emblements of corn sown, roots planted, or other annual artificial profit; but not of fruit-trees, grass, and the like. *Shep. T.* 471: 2 *Black. Com.* 122, 123.

By

By Stat. 11 Geo. II. c. 19, sect. 15, the representatives of tenants for life shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of the lessor.

TENANT-RIGHT.

The favour which is shewn to old tenants, by granting them a renewal of their leases preferably to a stranger, has given them, in the eye of the law, an interest beyond their subsisting term; and their interest is generally termed their *tenant-right of renewal*. This is particularly applicable to leases from the crown, from the church, from colleges, or from other corporations. In these cases, it often happens, that the situation of parties is such, that there are successive renewals of the lease, or successive enlargements of it, by reversionary grants. On the one hand, the property is more valuable to the actual tenant than any other person; he can therefore afford to pay more for the renewal than another. On the other, there is a natural partiality in the lessors to the present tenants, particularly if they, or those under whom they claim, have long been tenants of the land in question. Attempts have been made to establish an obligation in landlords to renew, but they have not succeeded. The renewal, therefore, is still a matter of favour and of chance. Courts of equity have so far recognised the tenant-right to be a real benefit, and, as such, entitled to their protection, as to decree, that new or reversionary leases (gained by undue means or supposition of the tenant-right of renewal) should be for the benefit of the persons interested in the ancient leases; and, consequently, that those, who obtain such new leases, and were thereby legally possessed of them, should be trustees for that purpose. 3 Co. Litt. 290, b. n. 1, sect. ix.

TENDER.

TENDER. — See *Covenant, Replevin*.

A tender is an offer of money, or to perform a duty.

To make a tender of money lawful and effectual, it should be made,

1. In the presence of one competent witness at least.
2. It should be made in lawful English money; but it is held, that a tender of bank-notes is good, unless the creditor makes the circumstance of its being in bank-notes a special objection at the time. 3 *T. Rep.* 554. And, by *Stat.* 37 Geo. III. c. 91, after tender of bank-notes, the party cannot be arrested, but only served with common process. And a tender in foreign money, made current by proclamation, is a good tender. 5 *Rep.* 114.
3. It should be of the very sum due; though a tender of more does not vitiate it. 5 *Rep.* 114: 1 *Str.* 916.
4. It should be a real and substantial tender, by holding open the hand or bag towards the party with the money in it. And it may be prudent actually to count it out before him; though this is not absolutely necessary, if it can be proved there was the sum to be tendered. 5 *Rep.* 115.
5. It should be without condition, as was determined by *Lord Kenyon, T. 1793*. James brought an action against John for the rent of a house, which was eighty guineas; to which action John pleaded a tender. It appeared in evidence, that John tendered eighty guineas to James, provided he would give him a receipt in full of all demands, which James refused to do, because he said John owed him money on other accounts. *Lord Kenyon* was clearly of opinion that this was not a legal tender. A legal tender must be a simple act, without any condition annexed to it.

6. It should be before action brought.

It follows, from the observations which have been made, that a mere promise, or saying to the creditor "I am ready

" to

“ to pay you,” — “ Come with me and receive your money,” and such like declarations, are no legal tenders.

No tender in silver money, exceeding £ 25, at one time, is a sufficient tender in law for more than its value by weight, at 5s. 2d. per ounce.* *Stat. 14 Geo. III. c. 42.*

If money is brought to a creditor's house, and delivered to his servant, who retires and appears to go to the master, and returns with an answer that he will not receive it, it is evidence to be left to the jury, from which they may infer a tender was made. 1 *Espin. Rep.* 350.

A tender of money, payable on a certain day, may be made at any time before the day expires. *Co. Lit.* 202.

As to tender of rent, it is to be observed, where no place off the land is appointed for the payment of rent, the tender must be made on the land. A reference to the article DEMAND will shew on what part of the house or land the tender must be made. And, as to the time of the tender, it may be made to the person of the lessor upon the land, at any time of the day on which it becomes due; but, if made on the land, the lessor not being present, the tender must be made before sun-set, and the party should remain till after sun-set.

A tender on the premises before the distress for rent is taken makes the distress wrongful. A tender after the distress, and before the impounding, makes the detainer wrongful. But a tender after the impounding makes neither the one nor the other wrongful; for, it comes too late. 8 *Rep.* 147.

In an action of covenant for nonpayment of rent, defendant pleaded a tender on the day. The witness proved, that the defendant went purposely to pay his rent, and said to the plaintiff, “ I am come to pay you for the rent,” but

* This clause was introduced into a temporary statute, which expired several years since, and has not since been revived.

did not produce or shew the money; and, it being proved, that the plaintiff refused upon other grounds than that of the quantity or quality of the money, Mr. Justice Buller held it to be a good tender in this case. *Somerset Spring Affizes*, 1786: *Crompt.* 152.

Tenant may, on tender of rent, deduct the land-tax. 3 *T. Rep.* 455.

There are several statutes which authorize a *tender of amends*: as the *Stat.* 11 Geo. II. c. 19, sect. 20, in cases of distress for rent; *Stat.* 17 Geo. II. c. 38, sect. 10, in cases of distress for poor's rates; *Stat.* 24 Geo. II. c. 44, in actions against justices of the peace; *Stat.* 23 Geo. III. c. 70, sect. 30, in actions against Excise-officers; *Stat.* 24 Geo. III. c. 47, sect. 35, in actions against Custom-house officers; and *Stat.* 21 Jac. I. c. 16, in cases of involuntary trespass and disclaimer.

After a tender has been made, and the money refused, the creditor may make a fresh demand; and, if it is not then paid, the former tender and refusal will not avail; but creditors should be careful not to commence an action after tender and refusal, and before a new demand and refusal have taken place. 1 *Esplin. Rep.* 115.

The clerk to the attorney in the cause is not a person authorized to make a demand after a tender and refusal. 2 *T. Rep.* 485.

Where a person comes into possession of goods wrongfully, no tender of freight paid by him is necessary to entitle the owner of the goods to an action. *Ibid.*

If, upon a tender pleaded, the plaintiff will not receive the money, but take issue upon the tender, and it is found against him, the money is lost for ever. *Imp. Pr.* 192.

Tender of stock must be at the last part of the day it can be accepted. *Str.* 777.

If the condition of a bond be, that the obligor shall come such a day to such a place, and shew the obligee a release,

release, and he doth come to the place the latter part of the day, and doth stay there until the light of the day be gone, ready to shew him his release, but the obligee comes not thither; this is a good performance of the condition. 22 Edw. IV. 40.

THEFT.

A theft, or stealing, differs from a robbery in this, that, to constitute a robbery, there must be previous *violence* used, or a *putting in fear*, which do not enter into the idea of a theft. See ROBBERY.

It is now fully established, that, in all cases where horses or carriages are hired, and are never returned, if the jury are of opinion, from the circumstances, that the persons to whom they are delivered intended, at the time of hiring, never to restore them; or that the intention to steal them, or convert them to their own use, existed in their minds at the time they gained possession; they are guilty of felony. *Leach*. 189, 327. And, where a person hires a horse for a particular time, or to go a specific journey, and, after complying with the terms of the special agreement, sells it, his possession being then unsupported by any privity of contract or consent of the owner, he is held to be guilty of felony. *Ibid*. And it is now generally held, that, if the possession of property is obtained by any contrivance *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into cash, or gold into silver, it amounts to a felony. *Id*. 206, 226, 239.

THREATS. — See *Menace*.

TIMBER. — See *Tithes*, *Trees*.

TIME.

TIME. — See *Bills of Exchange, Calendar, Tender.*

A month in law is a lunar month or twenty-eight days, unless otherwise expressed; therefore, a lease for "twelve months" is only for forty-eight weeks; but, if it be for "a twelve month," in the singular number, it is good for the whole year. *Noy's Maxims*, 11: 2 *Black. Com.* 141.

In bills of exchange and promissory-notes, a month is always a *calendar-month*. *Black. Com.* 141, *n.* But a month in a statute is a *lunar month*, unless otherwise expressed. 6. *T. Rep.* 224: *Doug.* 446.

Where a ship is freighted by the month, the computation shall be by the calendar, not the lunar, month. 1 *Esp. Rep.* 186. But it is otherwise of the months mentioned in the Southern Whale-Fishery Acts. *Id.* 246.

Where a computation is to be made from an act done, the day when such an act was done is to be included. Therefore, when the law requires a month's notice of an action, the month begins with the day on which the notice is served. 3 *T. Rep.* 623.

Indentures of lease were dated the 26th of May, to hold for three years *from henceforth*, and the indentures were delivered at four o'clock in the afternoon of the 20th of June: it was adjudged, that *from henceforth* shall be accounted from the time of the delivery of the indentures, and not by any computation from the date. *Co. Lit.* 5, 1, *a*: *Clayton's Case*: 1 *L. Raym.* 281.

If a lease be made to hold from the day of making, the day of making is excluded; for, *from* signifies the term from which, as *until* signifies the term to which, and *from* has an exclusive acceptation. *Co. Lit.* 5, 94, *a*: *Barwick's Case*: *Wing. Maxims*, 11: See the subject at large, *Wingate*, 278.

It

It is now determined, (*Cowp.* 714.) that *from the day* may either be inclusive or exclusive of the day, according to the context and subject-matter. See 2 *Black. Com.* 319.

It is a general rule that the law will not admit of fractions of a day; *i. e.* the law will not account by minutes or hours to make priorities in a single day, unless it be to prevent a great mischief or inconvenience. As, if a bond be made the first of January, and this bond is released the same day, the bond may be averred to be made before the release, &c. 1 *L. Raym.* 281. And, in the space of a day, all the twenty-four hours are usually reckoned. Therefore, if I am bound to pay money on a certain day, I discharge the obligation if I pay it before twelve o'clock at night.

A person is of age the day before his birth-day. *L. Raym.* 480, 1096. See AGE.

TITHES.

Tithes are considered by BLACKSTONE as a species of incorporeal hereditaments, and defined to be a *tenth* part of the increase yearly arising and renewing from the profits of the land, the stock upon land, and the personal industry of the inhabitants. The first species being usually called *predial*, as of corn, grass, hops, and wood; the second *mixed*, as of wool, milk, pigs, &c. consisting of natural products, but matured and preserved in part by the care of man; and of these two sorts the *tenth* must be paid in gross: the *third*, personal; as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due. 2 *Com. c.* 3.

Tithes are also divided into *great* and *small*. Great tithes are chiefly corn, hay, and wood; small tithes are the predial tithes of other kinds, together with mixed and personal tithes.

Great

Great tithes generally belong to the rector, and small tithes to the vicar. *Cro. Car.* 20.

Some things may be great or small tithes, in regard of the place; as hops in gardens are small tithes, and, in fields, may be great tithes: and it is said the quantity may turn small tithes into a great one, if the parish is generally sown with it. *1 Roll. Abr.* 643: *1 Cro.* 578: *Wood's Inst.* 162.

Predial great tithes now appear to be corn, grain, hay, clover-grass when made into hay, wood, underwood, and beans and peas, when sown in fields.

The predial small tithes are flax, hemp, madder, hops, garden-roots, and herbs, as potatoes, turnips, parsley, cabbage, saffron; and the fruits of all kinds of trees, as apples, pears, acorns, &c.; and all kinds of seeds.

Personal tithes are only payable by special custom, and perhaps are paid no where now in England, except for fish caught in the sea and for corn-mills. *3 Burn. Eccl. L.* 473.

The following alphabetical arrangement will furnish useful information on the subject of tithes.

ACORNS. — Acorns, as they yearly increase, are liable to the payment of tithes; but this is where they are gathered and sold, and reduced to a certain profit: not when they drop, and the hogs eat them. *2 Inst.* 643: *Heil.* 27.

AFTERMATH, or *after-pasture*, pays no tithes, except by custom. *2 Inst.* 652: *2 Danv. Abr.* 589: *L. Raym.* 243. But see GRASS.

AGISTMENT. — Tithe of agistment is a predial tithe, (*3 Anst.* 760,) and is the tenth part of the value of keeping or depasturing such cattle as are liable to it. Agistment of cattle upon pasture-land, which hath paid no other tithes that year, pays tithe for the cattle. If a man breeds or buys barren unprofitable cattle and sells them, he shall pay for the agistment; but, if he depastures his land with his cattle, used in husbandry in the parish where depastured, he shall pay no

tithes. 1 *Roll. Abr.* 646, *pl.* 2, 3, 6, 7: *Cro. Eliz.* 446: 1 *L. Raym.* 130. Otherwise, if used in another parish. 7 *Mod.* 114: 1 *L. Raym.* 130. So of milch cattle. 1 *Roll. Abr.* 646: 1 *L. Raym.* 130. And it seems the better opinion that no tithe is payable for the agistment of a saddle-horse of an occupier of land. 1 *Roll. Abr.* 642, *pl.* 4: *Cro. Jac.* 430. Not is tithe payable for milch cattle reserved for calving, while they are dry; but, if afterwards sold, or milked in another parish, an agistment-tithe is due for them for the time they were dry. *Heil.* 100: 1 *L. Raym.* 130. No tithe is due for the pasture of young cattle, reared to be used for husbandry or the pail. *Cro. Eliz.* 476. But, if such young beasts are sold before they come to such perfection as to be fit for husbandry or to give milk, tithe is payable. *Heil.* 86. An agistment-tithe is due for all such cattle as are kept for sale. *Cro. Eliz.* 446, 476: *Jenk.* 28, *pl.* 6: *Cro. Car.* 237: *Cro. Jac.* 430: 1 *Roll. Abr.* 647, *pl.* 14. But if any cattle, which have neither been used in husbandry nor for the pail, are killed and spent at home, no tithe is due for their pasture. *Jenk.* 281, *pl.* 6: *Cro. Eliz.* 446, 476: *Cro. Car.* 237. Agistment-tithe is due for depasturing any sort of cattle, the property of a stranger. *Cro. Eliz.* 276: *Cro. Jac.* 276: *Bunb.* 1: *Freem.* 329. But no agistment-tithe is due for any beasts depastured on the headlands of ploughed fields, so that they are not wider than is sufficient to turn the plough and horses upon. 1 *Roll. Abr.* 646, *pl.* 19. And it has in some cases been held, that no tithe was payable for cattle depastured in grounds that have, in the same year, paid tithe of hay. *Bunb.* 10, 79: *Poph.* 142: 2 *Roll. Rep.* 191. Or of corn, *Bro. Dism.* 18: 1 *Mod.* 216. [But see post GRASS.] And it does not seem to be quite settled whether agistment-tithe is due for sheep. The principal cases on the subject are, 1 *Roll. Rep.* 63, *pl.* 7: 1 *Roll. Abr.* 641, 642, 647: *Poph.* 197: *Cro. Car.* 207: *Bunb.* 90, 313: *Gilb. Rep.* 231.

This

This tithe is to be paid according to the price for keeping cattle on similar lands in the neighbourhood. 3 *Burn. Eccl. L.* 448. Others say, a tenth part of the yearly value of the rent is payable; *i. e.* 2s. per pound, though the twentieth part is usually accepted. 1 *Roll. Abr.* 646: *Hard.* 184.

ALDER-TREES, Ash, Asp, Beech, &c. See TREES.

BARK of trees is not liable, if the trees were timber. 11 *Rep.* 49.

BARREN LAND is not tithable; and, by *Stat.* 2 and 3 *Edw. VI. c.* 13, barren land improved shall, for the first seven years, be discharged of tithes; but it shall, during the seven years, pay such small tithes as have been used to be paid before. And, if land is over-run with bushes; or become unprofitable by bad husbandry, it is not barren land; and, if it be grubbed, or ploughed and sown, it immediately pays tithes. 2 *Inst.* 656: *Cro. Eliz.* 475: 2 *L. Raym.* 991.

BEEES are tithable for their honey and wax by the tenth measure and tenth pound. 1 *Roll. Abr.* 651: 3 *Cro.* 404, 559: *F. N. B.* 404.

BRICKS pay no tithe; for, they are of the substance of the earth, and of no annual increase. 1 *Cro.* 1.

CALVES are tithable; and the tenth calf is due *when weaned*, and the parson is not obliged to take it before; but, if in one year a person hath not ten calves, the parson is not entitled to tithes in kind that year, without a special custom for it; though he may take it in the next year, throwing both years together. 1 *Roll. Abr.* 648: *Raym.* 277. For calves bought in, and sucklers, no tithes are due.

CATTLE sold pay tithes; but not such as are kept for plough or pail: but, if such cattle are sold before used, or if, being past labour, or barren, are fatted and sold, tithes are due; but not if the owner kill and spend them in his house. Cattle feeding in large commons, where the bounds of parishes are not certainly known, shall pay tithes where the owner of them lives; and, if fed in several

ral parishes, and they continue above a month in each parish, tithes shall be paid to the two parishes proportionably. 1 *Roll. Abr.* 635, 646, 647: *Hardr.* 35: *Stat.* 2 and 3 *Edw. VI. c. 13. sect. 3.* For cattle taken in to graze, a tenth part of the money received shall be paid.

CHALK and *chalk-pits* pay no tithes, nor do bricks, clay, coal, or mines, they being of the substance of the earth, and not annually increasing. 2 *Inst.* 651.

CHEESE pays tithe by custom, where tithe is not paid for the milk; but, if the milk pays a tithe, the cheese is discharged. 1 *Roll. Abr.* 651. See **MILK**.

CHICKEN are not tithable, if tithe is paid for the eggs. 1 *Roll. Abr.* 642.

COLTS pay tithes the same as calves. 1 *Roll. Abr.* 642.

CONIES are tithable only by custom, for those only that are sold. 2 *Dany. Abr.* 583.

CORN pays a predial tithe. It is tithed by the tenth cock, heap, or sheaf; which, if the owner do not set out, he may be sued, under the *Stat.* 2 and 3 *Edw. VI. c. 13.* If corn be sold standing, the vendee shall pay the tithes; but, if sold after severance, the vender must. *Hard.* 380, 381. If the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof,* the owner of the land cannot justify turning in his cattle upon the land to depasture it, in the usual course of husbandry, whereby the cattle consume the tithes; but his remedy is either to bring an action, or to distrain the tithes as doing damage. 2 *Vent.* 48: 1 *Sid.* 283: *L. Raym.* 189: 8 *T. Rep.* 72. No tithes are due of stubbles. 2 *Inst.* 261, 652: 1 *Roll. Abr.* 640, pl. 14. There are various opinions, whether rakings of corn, involuntarily scattered, are tithable; but the better opinion

* Where tithes are set out, no notice by the common law is necessary, but it is required by the canon law. And this notice is often required by custom, in which case it is good, and must be complied with. 3 *Barr.* 189.

seems to be, that such takings are. See 1 *Roll. Abr.* 645, pl. 11: *Cro. Car.* 278, 475: *Preem.* 335: *Moot*, 278: 12 *Mod.* 235.

DEER are not tithable, being *feræ naturæ*, wild by nature; though in parks, &c. they pay tithe by custom. Nor *fawns*. 2 *Inst.* 651.

DOVES, if kept in a dove-house, and not spent in the owner's house, but sold, are tithable. 1 *Vent.* 6: 12 *Mod.* 77: 1 *Roll. Abr.* 644, Z. pl. 5, 6.

EGGS pay tithes, where tithes are not paid for the young, except such as are wild by nature. 1 *Roll. Abr.* 636, 642: 2 *P. Wms.* 463. But no tithes are due of the eggs or young of any birds or fowls, which are kept only for pleasure. *Bro. Dism.* pl. 20.

FALLOW GROUND is not tithable for pasture in that year in which it lies fallow, unless it remains beyond the course of husbandry. 1 *Roll. Abr.* 642.

FENNS, drained and cultivated, pay tithes. 1 *Roll. Rep.* 354.

FISH, taken in the sea, or common or open rivers, are tithable only by custom; even though they are in those rivers taken by one who has a several fishery; and the tithe is to be paid in money, and not the tenth fish; but fish in ponds and rivers, enclosed, ought to be set out as a tithe in kind. 2 *Dant. Abr.* 583, 4: *Noy*, 108: 1 *Roll. Abr.* 636: *Cro. Car.* 332: 1 *Lev.* 179.

FLAX. — Every acre of hemp or flax sown shall pay yearly 5s. for tithe, and no more. *Stat.* 11 and 12 W. III. c. 16.

FOREST-LANDS shall pay no tithes while in the hands of the king; but, in the hands of a subject, they shall. 1 *Roll. Abr.* 655: 3 *Cro.* 94.

FOWLS, as hens, geese, ducks, and turkeys, are to pay tithes in the eggs or the young, according to custom, but not both. 2 *P. Wms.* 463. The rule extends to all birds

and fowls, except such as are wild by nature. *Moor*, 599; 1 *Roll. Abr.* 642, pl. 6: 2 *P. Wms*, 463. Or are kept only for pleasure. *Bro. Dism.* pl. 20.

FRUIT, as apples, pears, plums, cherries, &c. pay tithes in kind when gathered; and ought to be set out according to the statute. 2 *Inst.* 621. And notice should be given to the vicar when gathered; and, if it be spoiled by reason of his not fetching it away in due time, he must bear the loss.

FRUIT-TREES, cut down and sold, are not tithable, if they have paid tithe-fruit that year before cut. 2 *Inst.* 621.

FURZES, if sold, pay tithe; not if used for fuel in the house, or to make pens for sheep, &c. *Wood's Inst.* 166.

GARDENS are tithable as lands, and therefore tithes in kind are due for all herbs, plants, and seeds, sown in them; but money is generally paid by custom or agreement.

GRASS mown is tithable by payment of the tenth cock, or according to custom. The parson may let it lie till made into hay. If grass be sold standing, the buyer pays the tithe; if sold after cut, the seller. 1 *Str.* 245: 1 *Roll. Abr.* 644, 5. Tithe of hay is to be paid, although beasts of the plough or pail, or sheep, are to be foddered with such hay. *Cro. Jac.* 47: 1 *Roll. Abr.* 650, pl. 12: 12 *Mod.* 497. But no tithe is due of hay grown upon the headlands of ploughed grounds, provided that such headlands are not wider than is sufficient to turn the horses and plough upon: 1 *Roll. Abr.* 646, pl. 19. It is laid down in one old case, that, if a man cuts down grass, and, while it is in the swathes, carries it away and gives it to his plough-cattle, not having sufficient sustenance for them otherwise, no tithe is due, 1 *Roll. Abr.* 645. In one case the Court of Exchequer seemed to be of opinion, that no tithe is due of vetches or clover, cut green, and given to cattle in husbandry. *Bunb.* 279. But, in another case, it was afterwards held, that the right to tithe of hay accrues upon mowing the

the grass; and that the subsequent application of it, while in grass, or when made into hay, shall not, although beasts of the plough or pail are fed with it, take away the right. 12 *Mod.* 498. It is laid down in some books, that no tithe is due of aftermath-hay, because tithe can only be due once in the same year on the same land. *F. N. B.* 53. But it is held in others, that tithe is due of aftermath-hay. 1 *Roll. Abr.* 64, pl. 11: *Cro. Eliz.* 660: *Cro. Jac.* 116: *Cro. Car.* 403: 12 *Mod.* 498: *Bunb.* 10. And the principle upon which the doctrine, that no tithe is due of aftermath-hay, is founded, is denied in some modern cases. In some of these it is laid down, that tithes shall be paid of divers crops grown upon the same land in the same year. *Bunb.* 19, 314. In others it is held, that, wherever there is, in the same year, a new increase, tithe is due. *Bunb.* 9: *Gilb. Rep. in Eq.* 231.

HAY pays a predial tithe. [See GRASS.] The tenth cock is to be set out and paid, after made into hay, by the custom of most places; and by custom generally, but not of common right, the parishioners shall make the grass cocks into hay for the parson's tithe; but, if they are not obliged to make the tithe into hay, they may leave it in cocks, and the parson must make it; for which purpose he may come on the ground, &c. 1 *Roll. Abr.* 643, 647, 650: 2 *P. Wms.* 523.

HEADLANDS. — See *Corn* and *Grass*.

HEMP. — See *Flax*.

HERBAGE. — See *Agistment*.

HONEY. — See *Bees*.

HOPS are tithable after they are gathered from the bind, and should be measured in baskets before being dried, and every tenth basket set out for the tithes. *Walton v. Tyers*, *Bro. P. C.* And it seems that a custom to set out the tithes by the tenth hill, where the rows are unequal, leaving the binds uncut, and the poles standing, cannot be supported. 7 *T. Rep.* 86.

HORSES. — See *Agistment*.

HOUSES for dwelling are not properly tithable. A *modus* may be paid for houses in lieu of tithes of the land upon which they are built; and many cities and boroughs have a custom to pay a *modus* for their houses. 11 *Rep.* 16: 2 *Inst.* 659.

LAMBS and KIDS (*Wood.* 167) pay a tithe as calves; but, if lambs are yeaned in one parish, and do not tarry there thirty days, no tithe is due to the parson of that place. If there be a custom that the parishioners, having six lambs or under, shall pay so much for every lamb; and, if he have above that number, then to pay the seventh, it is good. 3 *Cro.* 403. Tithe of lambs is not due of common right unless there be ten. 1 *L. Raym.* 677.

LEAD may pay tithes by custom, as it does in some counties; but it doth not without it. 2 *Inst.* 651.

LIME and LIMEKILNS are tithable only by custom. 1 *Roll. Abr.* 642.

MADDER is now tithable in kind. It was liable for twenty-eight years only to a *modus* of 5s.; but the statutes for that purpose are now expired. *Stat.* 31 *Geo.* II. c. 12: 5 *Geo.* III. c. 2.

MAST of oak and beech pays tithes, in the same circumstances as acorns.

MILK is tithable where no tithes are paid for cheese all the year round, except when custom over-rules; and it is payable by every tenth meal, not tenth quart or part of any meal. And it was formerly held, that it was to be brought to the house of the parson, &c.; in which particular this tithe differs from all others, which must be fetched by the receiver. But this is only where there is a special custom; and it seems now decided, that the tithe of milk is by setting out every tenth morning and evening's meal in clean vessels belonging to the owner of the milk, and leaving the same therein till the vessels are again wanted by the owner; and,

and, if not fetched away by the parson prior to that time, the owner is at liberty to throw it on the ground; and in the intermediate time the owner is not answerable for any accident that may happen to it. *Bro. P. C.* In some places they pay tithe-cheefe for milk; and in others some small rate, according to custom. *Cro. Eliz.* 609: 2 *Danv. Abrid.* 596.

MILLS. — It is now settled that tithes of all mills are personal tithes; and only a tenth part of the clear profit, deducting all charges and expenses, is payable as tithe. *Bro. P. C.*: 2 *P. Wms.* 463.

MINES. — See *Chalk*.

NURSERIES of trees shall pay tithes, if the owner dig them up and makes profit of them by felling them. 2 *Danv. Abrid.* 585: 1 *Co.* 526: 2 *Jon.* 416: *Godb.* 431. And, if he pulls them up himself and sells them, he shall pay the tithe; but, if he sells them particularly to another, the buyer shall pay the tithes. *Hardres*, 386.

OAK-TREES. — See *Trees*.

ORCHARDS pay tithes, both for the fruit they produce, and the grass or grain, if any be sown or cut therein. 2 *Inst.* 652.

PARKS are tithable by custom for the deer and herbage; and, when disparked and converted into village, they shall pay tithes in kind. The tithes of parks may be part certain and part casual; and 2s. a year, and the third shoulder of every deer, hath been paid as tithe for a park. 1 *Roll. Rep.* 176: *Hob.* 37, 40.

PARTRIDGES and **PHEASANTS**, as they are *feræ naturæ*, yield no tithes of eggs or young. 1 *Roll. Abr.* 636.

PEASE, if gathered to sell or feed hogs, pay tithes; but not green pease spent in the house. 1 *Roll. Abr.* 647. Earling-pease, sown in fields, and gathered green for sale, are a small tithe. *Bro. P. C.*

PIGEONS pay tithes when sold; and this holds good if they lodge in holes about the house, as well as in a dove-house;

house; and, by custom, if spent in the house, they may be tithable, though not of common right. 2 *Danv. Abrid.* 583, 587. The vicar is entitled to the tenth of the value if sold.

PIGS are tithable as calves. *Ibid.*

QUARRIES of stone, &c. are not subject to pay tithes, because they are part of the inheritance; and tithes ought to be collateral to the land, and distinct from it. 1 *Roll. Abr.* 644.

RABBITS. — See *Conies*.

RAKINGS OF CORN. — See *Corn*.

SAFFRON pays a predial and small tithe. 1 *Cro.* 467.

SALT is not tithable but by custom only. 1 *Bunb.* 10.

SHEEP. — A tithe is paid for sheep, lambs, and wool; and therefore they pay no tithe for their feeding. [See *AGISTMENT*.] If sheep are in the parish all the year, they are to pay tithe-wool to the parson; but, if removed from one parish to another, (without fraud,) the parson of each parish is to have tithe *pro rata*, where they remain thirty days in a parish; and, if they are fed in one parish, and brought into another to be shorn, the same tithing is to be observed. 1 *Roll. Abr.* 642, 647: 3 *Cro.* 237. It seems now the rule is, that tithe of wool shall be paid where the sheep are shorn, and agistment-tithes in other parishes, where they have been depastured. *Shaw's Law of Tithes*.

STUBBLE. — See *Corn*.

TARES, VETCHES, &c. are tithable; but, if they are cut down green, and given to the cattle of the plough, where there is not a sufficient pasture in the parish, no tithe shall be paid for them. 1 *Cro.* 139.

TILES are no yearly increase, and not tithable. 2 *Inst.* 651.

TREES. — Timber-trees, such as oaks, ashes, and elms, and in some places beech, &c. above the age of twenty years, were discharged of tithes by the common law, before the *Stat.* 45 Edw. III. c. 3; and the reason is, because such

trees

trees are employed to build houses; and houses, when built, are not only fixed to, but part of, the freehold. Loppings of timber-trees above twenty years pay no tithes, for, the branch is privileged as well as the body of the tree, although used for firing; and the roots of such trees are exempted as parcel of the inheritance. Trees, cut for plough-bote, cart-bote, &c. shall not pay tithes, although they are no timber; but all trees, not fit for timber, and not put to those uses, pay tithes. 1 *Roll. Abr.* 650: *Cro. Eliz.* 447, 499. Coppice-wood, which has been usually felled for firing, of whatever age it is, is always tithable. *Sid.* 300: 1 *Lev.* 189. And all germins, which spring from the roots of trees that have been felled, are tithable. *Walton v. Tryon*, *Mich.* 25 *Geo. II.*: *Godb.* 175: *Bro. Dismiss.* pl. 14: 11 *Rep.* 4. If, when the wood of coppice is felled, some trees growing therein, which are of the age of twenty years, and have never been lopped, are lopped, and these loppings are promiscuously bound up in faggots with the coppice-wood, tithe must be paid of the whole; because, it would be very difficult to separate the tithable wood from that which is not so; and the owner ought to suffer for his folly in mixing them. *Walter v. Tryon*. Tithes are in general due of ash, beech, birch, hazel, willow, fallow, alder, maple, and whitethorn, trees, (and of fruit-trees, *see* FRUIT-TREES,) of whatsoever age they are; because, these are not timber. *Plowd.* 470: *Cro. Eliz.* 477: 1 *Cro. Jac.* 190: 1 *Roll. Abr.* 640, pl. 5, 6: *Brownl.* 94. But if the wood of any of these trees is used in a particular part of the country, where timber is scarce, in building and repairing, no tithe is due of such wood, if of the age of twenty years, in that part of the country. *Hob.* 289: *Brownl.* 94. It is laid down in several old books, that, if a timber-tree, after it is of the age of twenty years, decays, so as to be unfit to be used in building, no tithe is due of the wood of this tree, because it was once privileged.

privileged. 11 *Rep.* 48: *Cro. Eliz.* 477: *Cro. Jac.* 100:
1 *Roll. Abr.* 840, pl. 2.

TURFS used for fuel are part of the soil, and tithe-free.
2 *Inst.* 651.

TURNIPS are reckoned among small predial tithes, and the tithes of them shall be paid as often as they are sowed, though twice or more on the same land and in the same year. So if eaten off the land by barren cattle, *Bunb.* 10. Or if drawn, and eaten by sheep.

TURKEYS. — See *Fowls*.

UNDERWOOD is tithable, though the tithe is not of annual payment; and is set out, while standing, by the tenth acre, pole, or perch; or, when cut down, by tenth faggot or billet, as custom directs; and, if he who sells the wood does not set out the tithe, he is liable to treble damages by *Stat.* 2 and 3 *Edw. VI.* c. 13. But, if the underwood is used for firing in a house of husbandry, or to burn brick to repair the house, or for hedging and fencing the lands in the same parish, it may be discharged from tithe. 2 *Inst.* 642, 643, 652: *Hob.* 250: 2 *Danv. Abr.* 597.

WARRENS. — See *Conies*.

WASTE GROUND, whereon cattle feed, is liable to the payment of tithes. 2 *Danv. Abrid.*

WOAD, growing in the nature of a herb, is a predial and small tithe. *Hutt.* 77: *Cro. Car.* 28.

WOOD [See *TREES*] is generally esteemed to be a great tithe. If wood-grounds have likewise timber-trees growing on them, and consists for the most part of such trees, the timber-trees shall privilege the other wood; but, if the wood is the greatest part, then it must pay tithes for the whole. 13 *Rep.* 13. If wood be cut to make hop-poles, where the parson hath tithe-hops, no tithe shall be paid. *Hughes Abr.* 689.

WOOL is a mixed small tithe, paid when clipped; one fleece in ten, or, in some places, one in seven, is given to the
the

the parson. If there is under 10 pounds of wool at the shearing, a reasonable consideration shall be paid, because the tithes are due of common right; and, if less than 10 fleeces, they shall be divided into 10 parts, or an allowance be otherwise made. All sheep killed, and sheep which die, pay tithe-wool; and neck-wool, cut off for the benefit of the wool, but not if it is to preserve the sheep from vermin, brambles, &c. 1 *Roll. Abr.* 645, pl. 14, 16. Also the wool of lambs shorn at Midsummer, though tithe was paid for the lambs at *mark-tide*, is tithable. 1 *Roll. Abr.* 646, 647; 2 *Inst.* 652; *Burb.* 90.

A real composition is, when an agreement is made between the owner of the lands and the parson or vicar, with the consent of the ordinary or patron, that such lands shall be discharged from payment of tithes, by reason of some land or other real recompense given to the parson in lieu and satisfaction thereof. 2 *Inst.* 490; *Regist.* 38; 13 *Rep.* 40. And it cannot now be established without evidence of the actual existence of the deed by which it was created. 3 *Bro. C. R.* 217.

With regard to compositions entered into between the tithe-owner and any parishioner for the latter to retain the tithe of his own estate, it has been decided, that they are analagous to leases from year to year between landlord and tenant; and, if they are paid without or beyond an agreement for a limited time, they cannot be put an end to without six months notice before the time of payment; and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive tithe in kind; an objection not permitted to a tenant, who denies the right of his landlord. 2 *Bro. C. R.* 161.

A custom to pay only part of the tithe, without substituting any thing in lieu of the remainder, is bad. But a custom to pay less than the whole tithe may be good, where something

something in lieu of, and as a compensation for the rest is paid to the parson. 7 *T. Rep.* 93.

To constitute a good *modus*, it seems necessary that it should be such as would have been a *certain, fair, and reasonable*, equivalent or composition for the tithes in kind, before the year 1189; and, therefore no *modus* for hops, turkeys, or other things introduced into England since that time, can be good. *Bunb.* 307.

TITLE. — See *Deposit*.

An abstract of a title ought to mention every incumbrance whatsoever affecting an estate, and should therefore contain an account of every judgement by which the estate is affected; and, as it is absolutely necessary to search for judgements immediately before the conveyances are executed, lest some judgements should be entered up during the treaty, it is not needful that the purchaser's solicitor should search for judgements before that time. And the seller is liable to pay the expense of conveyances and interest of money, where he misrepresents the charges affecting the estate. 1 *Espin. Rep.* 268.

A probable certainty of a good title is a sufficient ground for the court to found a decree for specific performance of an agreement for a purchase upon; for, it is impossible in the nature of things, that there should be a mathematical certainty of a good title. 2 *Atk.* 19, 20.

When terms are created to raise portions for younger children, it is necessary to inquire whether they are living or not, and whether they died within age, and, if not, whether they had any children, and whether those children died within age; because, if they did not, the remainder would become vested, and the estate or interest would alter its course.

If estates are given to trustees in trust to be sold, it will be proper to procure the concurrence of the heir, as that will

will render it unnecessary to prove the will against him. — But *Q.* if this is necessary in the case of a copyhold?

Where a party becomes a purchaser of several lots at an auction, it shall be deemed an entire contract; and, if the seller fails in making a title to any one of them, the party may rescind the contract, and refuse to take the others. *1 Espin. Rep.* 150.

In ejectment, the unsuccessful party may re-try the question as often as he pleases. *2 Black. Rep.* 1158: *Barnes*, 133. But a court of equity, in some instances, where there have been several trials in ejectment for the same premises, though the title be entirely legal, will grant a perpetual injunction. *1 P. Wms.* 672.

TOLL.

Q. Whether a right to take toll on goods sold in markets by sample can be supported? *4 T. Rep.* 107. Goods brought to market may be distrained for the toll, but not as for doing damage. *Cro. Eliz.* 75.

If a person, claiming a toll for passing over a highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial; and that the soil and the toll were, before the time of legal memory, in the same hands, though severed since; it will be presumed, that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand. *1 T. Rep.* 660.

TOWING.

An action of trespass will lie against a person for towing a vessel on the banks of a navigable river, unless it has been customary so to do: it can only depend on usage. There is no common-law right of towing. *3 T. Rep.* 253.

TRADE

TRADE AND MERCHANTIZE.

A bond not to carry on a certain trade in a certain place for any number of years, on a good consideration, is good; but a bond, conditioned not to set up a trade generally, although there be a consideration, is void. 2 *Lill. Abr.* 179.

In great concerns, where there are many partners, as in the case of great breweries, for instance, notwithstanding the old age, infirmity, or insanity, of one of the partners, the business may still be carried on for the benefit of the family; but, in small concerns, if a son ostensibly appears as the proprietor and conductor of the business, and the father, to whom the business actually belongs, is superannuated and incapable of conducting it, the son is liable on contracts connected with the business. 1 *Espin. Rep.* 320.

Trade is not transmissible, but is put an end to on the death of the trader. 1 *T. Rep.* 295.

By the Stat. 5 Eliz. c. 4, sect. 31, it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use, or exercise, any craft, mystery, or occupation, now used or occupied within England or Wales, except he shall have been brought up therein seven years at the least as an apprentice; nor to set any person on work in such mystery, &c. except he shall have been apprentice as is aforesaid, or else, having served as an apprentice as aforesaid, shall or will become a journeyman, or hired by the year; on pain of forfeiting 40s. a month.

On this statute the following points have been ruled:

1. It must have been a trade at the making of the statute. 2 *Salk.* 611: *Palm.* 528.

2 That it extends only to trades requiring skill and experience; and that, therefore, merchants, husbandmen, TRADE gardeners,

gardeners, and hemp-dressers, are not within it. 8 Co. 130: 2 Bulst. 190: Cro. Car. 499.

3. Following a trade seven years, without a binding, or serving abroad, is sufficient. 1 Salk. 67, 76: 2 Salk. 613.

And, by the Stat. 2 and 3 P. and M. c. 11, and 5 Eliz. c. 4, aliens and denizens are restrained from using any handicraft or trade therein mentioned, unless they have served seven years' apprenticeship within the realm, under the penalty of 40s. a month. Hutt. 132.

TREES. — See *Estovers, Gardens, Tithes*.

A termor may cut down underwood of hazel, willows, maple, or oak, at seasonable times. *F. N. B.* 59. It is no waste if usually cut and sold every ten years; but it is if he dig them up by the roots, or suffer the germins to be bitten by cattle after they are felled, so as they will not grow again. *Co. Litt.* 43: *Godb.* 210, pl. 298. Stubbing up an underwood, which is seasonable, is waste. *Co. Litt.* 53, b. If ashes are seasonable wood to cut from ten years to ten years, it is not waste to cut them down for house-boat. 7 H. VI. 38: *Godb.* 209, pl. 198.

If a tenant cuts down fruit-trees growing in a garden or orchard, it is waste. *Co. Litt.* 53: *Bro. Waste*, pl. 143.

A lessee may justify the cutting of trees for reparation of the houses. *Hob. Rep. Case*, 295. See *ESTOVERS*.

The tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them, but he cannot make new. *Co. Litt.* 53, b.

It is said that a lessee for life or years, by the common law, cannot take fuel but of bushes and small wood, and not of timber-trees; but, if lessor in the lease grants *firebote* expressly, then, if lessee cannot have sufficient fuel, he may take great trees. 3 Lev. 16: *Mich.* 14 Eliz.: *Bro. Waste*, pl. 89, cites 21 H. VI. 46.

The trees that grow in a lane belong of common right to the owner of the soil on both sides the way.

If the wind blows down a tree, the property of Peter, and it falls upon the land of Paul, it is lawful for Peter to go there and fetch it away. *Bro. Tresf.* 213. And so of loppings, if, notwithstanding all due caution, they fall on the land of Paul. So of fruit. *Ibid.*: *Fitz. Tresf.* 110: *Poph.* 163.

Trees are not to be lopped after the 1st of March. — Proof of twenty years' lopping is proof of ownership. *Co. Litt.* 53.

If Edward plants a tree on the extremest limits of his land, and the tree extends its roots into the land of Benjamin, Edward and Benjamin are tenants in common of the tree; but, if all the roots grow in Edward's land, though the boughs shadow the land of Benjamin, yet the property of the whole is in Edward; for, the branches shall follow the root. *Bull. N. P.* 85: 1 *Raym.* 737. But see 2 *Roll. Rep.* 141.

Oak, ash, and elm, are timber in all places; and, in some particular counties, by local custom, where other trees are generally used for building, they are for that reason considered as timber, as *beech* in *Buckinghamshire*. And, generally speaking, that is in law timber, which is deemed so by the custom of the country, which must appear from evidence.

If A. B. makes a lease for years, excepting the trees, the lessor may enter to shew the trees to a purchaser, or to cut them; and the lessee cannot bring trespass. *Bull. N. P.* 85: *L. Raym.* 552. But without an exception he cannot cut them. *Ibid.*

It has been said, a tree, containing four cubic feet of solid timber, is generally called a timber-tree. In the old books, the distinction taken is between twenty years growth and what is *sylva cædua*, or under twenty years; for, when

when of twenty years growth, it is deemed timber. 11 *H. C. 1.*

Shaw, in his *Law of Tithes*, thus expresses it: "It is the custom to estimate the age of timber by measuring round the middle part of the tree; and, if it is twenty-four inches in circumference, it is deemed twenty years growth; but, if under that measure, it is accounted underwood."

If timber-trees be blown down by the wind, the lessor shall have them; for, they are parcel of the inheritance, and not the tenant for life or years, unless it be to build withal, where houses are in decay; but, if they be dotards without any timber, then the tenant shall have them. *F. N. B. 59: Godb. 118.*

Lessee for life or years, tenant in dower or by curtesy, have only a special interest or property in trees, as a thing annexed to the land, so long as they are annexed thereto; but, if they, or any other, sever the trees from the land, then their interest is determined, and the lessor may take the trees as things that are parcel of his inheritance, the interest of the lessee being determined. *Noy, 65.*

A tenant for life, without impeachment of waste, has as full power of cutting down timber and of opening new mines for his own use as if he had an estate of inheritance, and is in the same manner entitled to the timber, if severed by others. 1 *T. Rep. 56: Harg. Co. Litt. 220.* But, although such a tenant for life may commit waste for his own benefit, yet he may be restrained, by an injunction out of the Court of Chancery, from making *spoil and destruction* upon the estate. This distinction was first introduced in the case of Lord *Barnard*, who was tenant for life without impeachment of waste, with remainder to his eldest son in tail; and, having conceived a displeasure against his son, from motives of spleen, began to pull down the family-mansion, Raby-Castle; but he was restrained by the chan-

cellor, and ordered to repair it. 2 *Vern.* 738. Since that case, such a tenant has been restrained from cutting down avenues and ornamental timber in pleasure-grounds, and also young trees not fit for timber. 1 *Bro.* 166: 3 *Bro.* 549. See also 3 *Woodd.* 339 *et seq.* where this subject is fully and learnedly treated.

Although a tenant in tail, after possibility of issue extinct, is not punishable for waste; yet, if he cuts down trees, they are not his property, but will belong to the first person (living at the time when they are cut), who has an estate of inheritance. *Harg. Co. Litt.* 27, b. : 3 *P. Wms.* 240.

Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage sustained by this cutting. 1 *L. Raym.* 738.

A copyholder may lop trees without special custom; i. e. he may cut off the under-boughs. *Cro. Eliz.* 361.

Lord Chief-Justice *Holt* was of opinion, that a copyholder holds the trees by copy of court-roll as well as the land, and that the lord could not cut them. 1 *L. Raym.* 552.

TRESPASS.

Trespass is founded on a wrong done to the possession. 4 *T. Rep.* 503. To entitle a man to bring *trespass*, he must, at the time when the act was done, either have the actual possession in him of the thing which is the object of the trespass, or else he must have a *constructive possession* in respect to the right being actually vested in him; as in the case of an estray or wreck before seizure by the lord. 1 *T. Rep.* 480, 12.

Every trespass or entry upon another man's lands, &c. is wilful, where the defendant, having notice to depart, or is warned not to come on the land, yet does so notwithstanding; and it is malicious, where it appears to be done to

harass

harass the defendant. 3 *Black. Com.* 214: 1 *Espin. Rep.* 425: 6 *T. Rep.* 11.

A bargainee shall not have trespass before entry, though the possession is transferred to him by the statute. *Carth.* 66: 2 *Morg.* 207.

TRIAL. — See *Evidence*.

Where one party in a cause offers to the other side to settle it, if a witness in the cause will make affidavit of certain facts in dispute, and such affidavit is made, it shall bind the party, and he shall not be admitted to dispute the question by a trial. 1 *Espin. Rep.* 178.

The statute of *James* enacts, that a tradesman's shop-book should not be evidence after a year. This might infer a surmise of parliament, that, of itself, it was evidence generally; yet it is not so, unless under circumstances for defect of better. Thus, where an action was brought by the plaintiff, being a brewer, for beer sold and delivered, it was proved, that the usual way of the plaintiff's dealing was, that the drayman came every night to the clerk of the brewhouse and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands, and that the drayman was dead. They proved his hand-writing to the book; and this was held good evidence of the delivery; otherwise of the shop-book singly without more. *Salk.* 285: *Tr.* 2 *Anne*.

And, in an earlier case, on a tailor's bill, a shop-book was allowed evidence, it being proved, that the servant, accustomed to make the entries, was dead, and that it was his hand in the book. *Salk.* 690, *Hil.* 11 *W.* III.

But, where the plaintiff, to prove delivery, produced a book which belonged to his cooper, who was dead, and whose name was set to several articles, as wine delivered to

the defendant, and a witness was ready to prove his hand, it is said, that Lord Chief-Justice *Raym.* would not allow it; for, that it differed from Lord Torr. case, (*in Salk.*) because there the witness saw the drayman sign the book every night.

TROVER. — See *Demand.*

Trover must be founded in the *property* of the plaintiff. 1 *T. Rep.* 56. And he must have the right of *possession* as well as of property. 7 *T. Rep.* 9. And, therefore, where furniture, which had been leased with a house, was wrongfully taken in execution by the sheriff, it was ruled, that the landlord could not maintain trover pending the lease. *Ibid.*

The demand, to lay the foundation for this action, must be made by the party, or one lawfully authorized.

TRUSTEES.

A trustee regularly is to have nothing for his own labour and pains. But, *Q.* may he not, prior to the acceptance of the trust, stipulate for an allowance? 3 *P. Wms.* 250, *n.*; 2 *Atk.* 60, 120. Where a trustee is engaged in a suit, and there be no misbehaviour on his part, the rule is to allow him his costs. *Prec. Chanc.* 254. And, although a trustee is not allowed any thing for his care and pains, yet he may employ a skilful bailiff. 3 *Atk.* 518. But he shall be responsible for the sufficiency of his bailiff, unless the will or deed creating the trust authorizes the appointment. 12 *Mod.* 560. The courts will not charge a trustee with imaginary value, he shall be charged as a bailiff only; and, although very supine negligence might indeed in some cases charge a trustee with more than he has received, yet the proof must then be very strong. *Burr.* 44: *Ca. Ch.* 53. And, if a trustee is robbed of the money he receives, he shall

shall be allowed it in account, the robbery being proved on his own oath. 2 *Ch. Ca.* 2.

An executor or trustee must now be considered as chargeable in equity with interest, whenever he appears to have made interest. 1 *Bro. Rep.* 375, 384. And not only with interest, but, if he has employed his trust-money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of such profits. 10 *Mod.* 21: 2 *Bro. Rep.* 430. And, if a trustee or executor retain money in his hands for any length of time, which he might, by application to the court, or by vesting in the funds, have made productive, he shall be charged with interest thereon. 2 *Vern.* 745: 1 *Bro. Rep.* 375, 73, 433.

There is a difference between executors and trustees; for, trustees have all equal power, interest, and authority, and cannot act separately as executors may, but must join both in conveyances and receipts; for, one cannot sell without the other, or be more a trustee than his partner; and therefore it is against natural justice to charge them for each other's receipts, unless in case of necessity, where they do join in receipts as not to distinguish what has been received by one and what by the other. *Vern.* 504, 515: 1 *P. Wms.* 81: 2 *Vern.* 570: *Cro. Eliz.* 312: *Atk.* 584: *Ambl.* 218. But executors have each an absolute power over the whole; and, therefore, if they join, they trust one another. 1 *P. Wms.* 241: 1 *Salk.* 318: *Pree. Chanc.* 173: 3 *Bro. Rep.* 90, 219: 2 *Fonbl. Eq.* 184.

Upon this principle it has been determined, that, where one trustee, having received the trust-money, hands it over to his companion, he shall be charged; for, where, by any act or agreement of a trustee, money gets into the hands of his companion, whether a trustee or co-executor, they shall both be answerable. 2 *Bro. Rep.* 116: 3 *Bro. Rep.* 112. But see 21 *Vin. Abr.* 534, pl. 9. So, if a trustee be privy to the embezzlement of the trust-fund by his com-

panion, he shall be charged with the amount. 1 Bro. Rep. 68.

TURBARY, OR TURF.

Common of turbary is a license to dig turf upon the ground of another, or upon the lord's waste. This is appendant or appurtenant to a *house*, and not to *land*, and cannot exclude the owner of the soil. 1 Inst. 4, 122: 4 Rep. 37.

TURPITUDE OF CONTRACT.

It is a rule both of law and equity, that *ex turpi contractu actio non oritur*, "no action will arise out of an illegal contract;" but it is material in the application of this rule to consider what is to be deemed *turpis contractus*, and the evidence which is admissible to shew it. As to what amounts to such a degree of turpitude as will vitiate the contract, it seems that considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity. But courts of law and equity distinguish between obligations for considerations past and considerations future; and, therefore, a bond, purporting to be in consideration of cohabitation had between the obligor and obligee, was held to be good. 2 Willf. 339: Ambl. Rep. 641.

The law of England appears formerly to have considered all persons in any manner connected with an illegal contract as excluded from relief in any manner relating thereto; and although, in ordinary cases, money paid by mistake may be recovered back again, yet the rule was to refuse relief to a person who had paid money under an illegal contract. 1 Salk. 22. But this rule has been broken in upon by many decisions. 1 Bro. 547: 1 L. Raym. 89. — And our courts in the application of it have even gone so far

far as to discriminate the different degrees of guilt; and, on the ground of such discrimination, have held, that money, paid for insuring lottery-tickets, may be recovered back from the insured. 2 *Black. Rep.* 1073: 1 *T. Rep.* 65. But that payment by the insurer, in pursuance of his engagement, cannot be recovered back. *Cowp.* 790. Yet, in both cases, the whole of the transaction is declared illegal, and prohibited by statute. So, in the case of an usurious loan, it is now settled, that the borrower may recover back, either in equity or at law, the excess of interest; for, he cannot be considered to be in *pari delicto* (equally criminal). *Forrest.* 38: *Doug.* 669, 670: *Talbot*, 38. But, in the case of smuggled goods, where a contract is made for them, the party cannot come into a court of law to recover. See SMUGGLING.

VICTUALLING-BILLS. → See *Navy-Bills*.

VICTUALS.

The extravagant price, which the most essential necessities of life have lately borne, has induced the venerable judge who presides in the Court of King's Bench to apply, with the utmost force, the remedies which the law has provided against forestallers, regraters, and engrossers.

There were formerly many statutes in force against those offences, which were all repealed by the *Stat.* 12 Geo. III. c. 71. But, notwithstanding this, the old common law on the subject remains in its full vigour.

These offences were taken notice of in very ancient times. It was a law before the conquest, *Decrevimus porro*, &c. "We decree, therefore, that no one shall buy
" any thing without the gate of the city which shall cost
" more than twenty pence; but, within the gates, the
" mayor of the town being present, or some other trusty
" person, or the king's bailiff himself, in a place where
" people

"people are known to meet for the purpose of buying and
 "selling, where every one shall transact his business
 "openly."

Among the laws of William the Conqueror, also, we
 have the following passage: "We decree, also, that no
 "cattle shall be bought unless within the gates of the city,
 "and this before three faithful witnesses; nor other neces-
 "saries, without a pledge and warranty. Also, no market
 "or fair shall be, unless in the cities and boroughs of our
 "kingdom."

So, in the time of Edw. III. a commission was issued
 "desiring Robert Hadham to sell the corn and other goods
 "of certain abbeyes, who (Robert Hadham) came and ac-
 "knowledgeed that he sold the corn of the prior of
 "Tickford in sheaves, standing in two stacks, for ten
 "pounds, which selling was contrary to the law and cus-
 "tom of England, for selling in sheaves before the corn
 "was threshed; which ought to have been done by mea-
 "sure after threshing of them: therefore, he was commit-
 "ted to prison; and it was adjudged, that he should be
 "removed from all offices of our lord the king, and be
 "fined."

All endeavours whatsoever to enhance the common price
 of any merchandize, and all kinds of practices, which
 have any apparent tendency thereto, whether by spreading
 false rumours, or by buying things in a market before the
 accustomed hour, or by buying and selling again the same
 thing in the same market, or by any other such like devices,
 are highly criminal at common law. And all such offences
 anciently came under the general notion of forestalling;
 which included engrossing, regrating, and all kinds of of-
 fences of this nature. 1 *Haw. P. C.* 234: 43 *Aff.* 38: 3
Inst. 195, 196: *Br. Indict.* 40: *Presentment*, 12: *Crompt.*
 80, b.

And

And surely there can be no attempt of this kind but must be looked upon as a high offence against the public; as it apparently tends to put a check upon trade, to the general inconvenience of the people, by putting it out of their power to supply themselves with a commodity, without an unreasonable expense; which often proves extremely oppressive to the poorer sort, and cannot but give just cause of complaint to the richest. 1 *Haw. P. C.* 234.

But it hath been resolved, that any merchant, whether he be a subject or a foreigner, bringing victuals or any other merchandize into the realm, may sell the same in gross; but that no person can buy within the realm any merchandize in gross, and sell the same in gross again; because, by such means, the price will be enhanced; for, the more hands any merchandize passes through, the dearer it must grow, because every one will make his profit of it; and, if such practices were allowable, a rich man might engross into his hands a whole commodity, and then sell it out at what price he should think fit; which is of such dangerous consequence, that the bare engrossing of a whole commodity, with an intention to sell it at an unreasonable price, is an offence indictable at the common law, whether any part thereof be sold by the engrosser or not. 1 *Hawk. P. C.* 234: 3 *Inst.* 196: *H. P. C.* 152: *Cro. Car.* 231, 232.

And so jealous is the common law of all practices of this kind, that it will not (as appears above) suffer corn to be sold in the sheaf; perhaps for this reason, because, by such means, the market is in effect forestalled. 1 *Hawk. P. C.* 235: 3 *Inst.* 197: *H. P. C.* 152.

As to the manner whereby offences of this kind are punishable by the common law, it is said that, by an ancient statute, the offender was to be grievously amerced for the first offence; for the second, to be condemned to the pillory; for the third, to be imprisoned; and, for the fourth,

fourth, to be compelled to abjure the vill. And there seems to be no doubt, but that, at this day, all offenders of this kind are liable to a fine and imprisonment, answerable to the heinousness of their offence, upon an indictment at common law. 1 *Hawk. P. C.* 235: 3 *Inst.* 195.

UNCONSCIONABLE BARGAIN. — See *Heirs.*

USAGE.

This differs from custom and prescription. Custom is a usage which the memory of man cannot reach beyond, and becomes a law common to all. Prescription is a usage which belongs to one, or a few only. Usage differs from both; for, it signifies a long-established practice relating to trade, &c.

USANCE.

Usance is a calendar-month, as from May 10 to June 10; and double usance is two such months.

USURY. — See *Partners.*

Usury, in a strict sense, is a contract upon the loan of money to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed or not. 3 *Inst.* 151: 1 *Hawk. P. C.* c. 82.

There are two branches of the Statute of Usury. 12 Anne, stat. 2, c. 16. Under the first, every agreement, contract, and security, for more than legal interest, is void. Under the second, the penalty of treble the value of the money lent is incurred only by taking, accepting, and receiving, more than legal interest; although there be no agreement

to that effect at the time of the contract, and the contract remaining good. 1 *Mod.* 69: 2 *Mod.* 307: 1 *Bull.* 17: 1 *Doug.* 237: *Cowp.* 113.

In order to constitute usury, there must be a *loan* and *borrowing*; and, where there is in truth a loan of money, the art of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking more than five per cent.; and, though the statute mentions only "for loan of moneys, goods, wares, merchandizes, or other commodities," yet any other contrivance, if the substance of it be a loan, will come under the word "indirectly," used in the statute. 4 *Black. Com.* 157.

What is or is not a loan, and what a sale, was elaborately considered by Lord Mansfield, in the case of *Floyer v. Edwards*, *Trinity-Term*, 14 Geo. III.; which case was, that *Edwards* sold *Floyer* goods at three months credit, but stipulated, in case the money should be unpaid, that *Floyer* should allow *Edwards* a halfpenny an ounce per month, till the debt should be discharged. This allowance was according to an usage in that particular trade, but was above the legal rate of interest. And it was determined, that the contract was a *bonâ fide* SALE, and therefore not usurious. "Let us," said My Lord Mansfield, "examine what the present contract is. It is said the plaintiff is a *lender*; let us see where there is the colour of a loan in this case. The plaintiff is a refiner, and deals in gold and silver wire: so is the defendant: and, in the ordinary course of dealing, the one buys and the other sells a quantity of this commodity on the terms and conditions before stated. There is no pretence of any negotiation for a *loan*, nor that one word passed about *borrowing* money; nor any evidence of an agreement to forbear paying the principal sum, contrary to the true intent and meaning of the statute. What are the terms of the contract? Are they

“ they any newfangled terms? So far otherwise, that the
 “ agreement barely cannot be called an *universal* practice,
 “ yet it is the *general* practice of the trade. It is true the
 “ use of this practice will avail nothing, if meant as an
 “ *evasion* of the statute; for, usage certainly will not protect
 “ usury. But it goes a great way to explain a transaction;
 “ and, in this case, is strong evidence to shew, that there
 “ was no intention *to cover a loan of money*. Upon a nice
 “ calculation it will be found, that the practice at the
 “ Bank in discounting bills exceeds the rate of 5 per cent.;
 “ for, they take interest upon the whole sum for the whole
 “ time the bills run, but pay only part of the money, by
 “ deducting the interest first: yet this is not usury. 3 T.
 “ *Rep.* 52. Here it appears that the whole agreement
 “ was made out first, the price of the goods fixed, and a
 “ limited credit given; but the party considers farther, that,
 “ perhaps, punctual payment might not be made; and
 “ provides that, in that case, the buyer shall pay him so
 “ much more. This is no agreement *for forbearance* be-
 “ yond the three months: the plaintiff might have brought
 “ his action instantly; and, therefore, if not paid, was at
 “ liberty to say, that the buyer should pay him a greater
 “ price. The authorities go still farther, and say, that,
 “ whenever it is in the power of a known *borrower* of mo-
 “ ney to pay the principal within a limited time without in-
 “ terest, upon nonpayment, the reservation of a larger sum
 “ than the statute allows is no injury; because, usury
 “ (in this view of it) is an agreement originally to pay the
 “ principal, with interest above the rate of 5 per cent.
 “ *Hawk. P. C. c.* 82, sect. 19. I see no manner of diffi-
 “ culty to arise from it. I lay the foundation of the whole
 “ upon a man’s going *to borrow*, under colour of *buying*.
 “ There the contract is usurious. But, where it is a *bond*
 “ *fide SALE*, as in this case, it certainly is not.” *Cowp.*
 113.

The

The question of usury, or whether a contract is a colour and pretence for an usurious loan, or is a fair and honest transaction, must, under all the circumstances of the case, be determined by a jury, subject to the correction of the court by a new trial. *Cowp.* 770: 3 *T. Rep.* 531.

It is also understood, that the forbearance of an ascertained debt is a loan.

And charging interest upon interest (unless, by a rest in the account, the previous interest becomes principal) is usury. But a memorandum, indorsed on a bond, which was conditioned for the payment of £100, by quarterly payments of £5 each, and interest at 5 per cent. "that, at the end of each year, the year's interest was to be added to the principal, and then the £20 received in the course of the year was to be deducted, and the balance to remain as principal," was held not to be usurious. 4 *T. Rep.* 613.

If there is an agreement to pay legal interest, and a premium is paid down over and above the interest, the agreement is usurious and void. 1 *Doug.* 235.

But the penalty is not incurred, if the premium itself does not exceed legal interest, nor till more than legal interest is actually received. *Ibid.*

Therefore, an action may be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it is not a year since what has been paid exceeded legal interest. *Ibid.*

Where, upon a negotiation for a loan of money, the lender says he cannot advance the money, but will furnish goods, which the other takes and sells, if the security given is for a sum of money greatly exceeding the value of the goods and 5 per cent. interest, this is an usurious loan, and the security and contract are both void. 2 *Daug.* 736: 1 *Espin. Dig.* 187.

An

An agreement to pay double the sum borrowed, or other penalty, on the nonpayment of the principal debt at a certain day, is not usurious, because the borrower may wholly discharge himself by repaying the principal according to the bargain. So, if a man lend another £100 for two years to pay for the loan £30, but, if the borrower pay the principal at the year's end, he shall pay nothing for interest; this is not usury; unless, in the former case it was agreed, that the money should not be paid on the day; and, in the latter, the clause of redemption be mere colour. *Cro. Jac.* 509: 5 *Repl* 69.

If a man gives an usurious bond, and tenders the whole money, yet if the party will take only the legal interest, he shall not forfeit the treble value. 4 *Leon.* 43. But, though the treble value is not forfeited unless something be taken above the legal rate, yet the very contract alone avoids the security. 1 *Hawk. P. C. c.* 82: *Cro. Eliz.* 20.

The receipt of interest before the time when it is in strictness due, being voluntarily paid by the debtor, for the greater convenience of the creditor, or for any other such like consideration, without any manner of corrupt practice, or any previous agreement of this kind, at the making of the first contract, does not make the party liable to the forfeiture of the treble value. 1 *Bulst.* 17, 20: *Yelv.* 30, 31: *Noy*, 171: 2 *Keb.* 690.

The loan of money for lawful interest shall not be construed to be within the statute, in respect of any expectations which the lender may have of a voluntary gratuity to be given him by the borrower, if there be no agreement relative to it. 4 *Co.* 70, b. And, if the lender receives a voluntary gratuity from the borrower, on payment of principal and interest, without any previous corrupt agreement to that effect, it is not usury. 2 *Cro.* 677: 5 *Cro.* 501.

A contract, reserving to the lender a greater advantage than is allowed by the statute, is equally within the meaning of it, whether the whole be reserved by way of interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value. *Cro. Jac.* 440.

No contract is usurious by which the lender runs the hazard of losing all his money, both principal and interest, and that risk appears on the face of the contract. As where, on a loan of a certain sum for a year for the victualling of a ship, it is agreed that, if the ship return, the lender shall have so many thousand fishes at such a rate, which exceeds the interest allowed by the statute; and, if the ship never returns, then he shall have nothing. *Cro. Jac.* 208, 209, 508, 509: *1 Keb.* 411, 539: *2 Bro. Rep.* 48. Or where, on the loan of £30, a bond is given for the payment of £100 on the marriage of a daughter of one of the parties; provided that, if either of them should die before, nothing shall be paid, *3 Keb.* 304. But it is clear, that, if the interest only be hazarded on such a contract, and the whole principal secured, the whole is usurious. *2 Roll. Rep.* 48: *Cro. Jac.* 508: *1 Lev. 5: 1 Sid.* 27.

It hath also been resolved, that an agreement to pay more than the lawful interest for the loan of a certain sum at a day appointed, if A. shall be then alive; and, if he shall be dead, then to pay such a sum, which is less than the principal, is void; for, if such a contingency would take the case out of the statute, by the same reason that the interest might be reserved on that contingency, twenty others might be added, which would amount to a certainty, and the statute wholly evaded. *5 Co.* 70: *Moore*, 397: *Cro. Eliz.* 642, 643, 741: *Lutw.* 468, 469.

The Stat. 14 Geo. III. c. 79, enacts, that mortgages and other securities, respecting lands in Ireland and the West

Indies, reserving interest allowed in those countries, (6 per cent.) shall be valid, though executed in England. But this act does not extend to personal contracts executed here.

3 *T. Rep.* 425.

Receiving upon a loan of stock the interest the stock itself would have produced is not usurious, unless the transaction be colourable, and a mere device to obtain more than legal interest. 3 *T. Rep.* 531.

The true distinction seems to be, that, where a person sells out stock to lend the amount produced by the sale to another, who is to replace it, the lender is entitled only to 5 per cent. for the amount which the stock produces; but, where the stock itself is transferred into the borrower's name, the lender is entitled to the amount of the dividends.

Per Lord Kenyon, Sittings after Mich. 1798, at Guildhall.

If a borrower of money gives a bond for the principal and interest at 5 per cent. and covenants at the same time also, to the lender, to pay him a certain proportion of the profits of a trade carried on by him in partnership with another person, it is an usurious contract: and the person, to whom the bond is given, cannot recover on the bond; for this reason, viz. that, although he was to gain by the profits, he was not to stand to the losses, of the trade. 4 *T.*

Rep. 353.

If a bill of exchange or note is given in consequence of an usurious contract, it is absolutely void, even in the hands of an innocent person, who may have taken it in the fair and usual mode of business, without any notice of the usury. *Doug.* 708.

R. borrowed of I. £5000, for which he gave his bond for £10000, payable on the contingency of his surviving the Duchess of Marlborough, though there was a great disparity of age; he being but thirty years of age, and she seventy; so that the contingency of his dying first appeared

very

very slender. Yet, it being proved that R. was of a very bad constitution, it was, on a solemn argument, adjudged a fair contingency; and, though the sum reserved far exceeded legal interest, yet, as defendant run the risk of losing both principal and interest, it was adjudged not to be usurious. 1 *Wils.* 286: 1 *Atk.* 304.

But, where the contingency, upon which the defendant is to lose the money, is so very slight, that it appears to be merely an evasion, it is otherwise. As if it was on the contingency of a young and healthy person dying within three months, it shall be deemed usurious. *Cowp.* 770.

Upon this ground it is, that the grant of an annuity, at ever so great an under price, is not usury, because the principal is absolutely lost and gone. 1 *Atk.* 300. And, though there be a certain value for such things, and the sum given be much below it, it is not usury, unless there is some secret contract to repay the principal. *Cro. Eliz.* 27.

So that, in cases of loans in this form, the point the question turns upon is, whether there was a fair *purchase* of an annuity, or a real *loan* of money? For, if the substance of the agreement was for a loan, a slight colourable contingency shall not take the agreement out of the Statute of Usury, where above legal interest has been reserved. *Cowp.* 770.

But, where the grant was in the form of an annuity, and there was a clause in the deed, that the borrower might repay the sum given for the annuity at a future period, which would seem to make the sum advanced a loan, and the annuity interest; yet it has been held not to be usury: for, the repayment was casual, and depended on the borrower (the grantor) himself; so that it was not in the lender's power to have his money at all events, and as to him the principal was gone. 3 *Wils.* 390.

It is said that, on an information upon the Statute of Usury, he who borrows the money may be a witness, after

he hath paid the money, but not before, because it would enable him to avoid his own deed. *Co. Lit.* 6, b.: 2 *Roll. Abr.* 685; 2 *Raym.* 191. But, nevertheless, it is also held, that, whenever a sum of money is paid in the name of interest, the person paying it is a competent witness to prove the circumstances of the case, in a *qui tam* action, at the suit of another person, although he hath not paid the principal sum. — The borrower may be a witness though the money is not paid, in all cases where the usury neither affects the debt nor avoids the contract. And, where the matter is doubtful, the objection shall only go to his credit, not to his competence as a witness. 1 *T. Rep.* 53; 4 *Burr. Manf.* 2251.

WAGES. — See *Seamen, Servants.*

WAGERS. — See *Gaming.*

Newmarket and Black Hambleton are excepted out of the *Stat.* 13 *Geo. III.* against races, &c. [See **GAMING,**] where a race may be run on any sum or stake less than £50. But, though such horse-races are lawful there, yet it has been determined, that they are games within the *Stat.* of 9 *Anne*, c. 14; and that, of consequence, wagers above £10 upon a lawful horse-race are illegal. 2 *Black. Rep.* 706. A foot-race and a race against time have also been held to be games within the Statute of Gaming. 2 *Willf.* 36. So, a wager to travel a certain distance within a certain time, with a post-chaise and a pair of horses, has been considered of the same nature. 6 *T. Rep.* 499. A wager for less than £10 upon an illegal horse-race is also void and illegal. 4 *T. Rep.* 1. Wagers in general, by the common law, were lawful contracts; and all wagers may still be recovered in a court of justice, which are not made upon games, or which are not such as are likely to disturb the public peace or to encourage immorality, or such as will probably affect the interests,

interests, characters, and feelings, of persons not parties to the wager, or such as are contrary to sound policy or the general interests of the community. 3 *T. Rep.* 693, where the legality of wagers is fully discussed.

Where a person had given £100 upon condition of receiving £300 if peace was not concluded with France within a certain time, and he afterwards brought his action to recover the £300, it was held, the wager was void, as being inconsistent with public policy; but he was allowed to recover back the £100, which he had paid, under a count for so much money had and received by the defendant to his use. 7 *T. Rep.* 535. So, also, a person was permitted to recover back his share of a wager against a stake-holder upon a boxing-match, 5 *T. Rep.* 405; the court not considering the conduct of the plaintiff in these instances so criminal as to deprive him of the benefit of their assistance.

WARRANT OF ATTORNEY. — See *Securities for Money.*

If a person is in custody of a sheriff's officer on a *mesne* process, he cannot execute a valid warrant of attorney without an attorney be present on his behalf, to be expressly named by him, and attending at his request to inform him of the nature and effect thereof, who shall subscribe his name thereto. *R. E.* 15 Car. II. : *R. E.* 4 Geo. II.

Where the warrant is given by a defendant in custody upon process of *execution*, or upon *criminal process*, or to a third person, at whose suit defendant is not in custody, an attorney's presence is unnecessary. *Cowp.* 142, 281 : 4 *T. Rep.* 443 : 7 *T. Rep.* 19.

By the course of the court, a warrant of attorney given to confess a judgement is not revocable. *L. Raym.* 766, 850. But the death of either party is, generally speaking,

a countermand of the warrant, for, it is in the nature of an adverse action. *Went.* 310: 2 *Str.* 718, 1081.

Yet, if either party die in vacation, within a year after giving the warrant of attorney, judgement may be entered up of course, at any time after in the vacation. 2 *Str.* 882; (but not in the subsequent term; 8 *T. Rep.* 257;) and it will be a good judgement at common law as of the preceding term, though it be not so upon the Statute of Frauds, in respect of purchasers, but from the signing. 1 *Salk.* 401: 6 *T. Rep.* 368: 7 *T. Rep.* 21.

Where there are several parties, and one of them dies before judgement, it may be entered by or against the survivors. 1 *Wilf.* 312: *Say. Rep.* 5: *Barnes*, 40, 53. But see *Barnes*, 45, *contra*.

If a warrant of attorney to confess a judgement is given unconditionally, or without delay of execution, judgement may be signed and execution taken out upon the same day it is given; and thus a debtor may give one creditor a preference to another, who has obtained judgement after a long litigation. 5 *T. Rep.* 235.

WARRANTY. — See *Contracts, Horses, Insurance*.

WASTE. — See *Commons, Encroachments*.

WAYS. — See *Highway*.

A right of way arises, 1. From the grant of the owner of the soil. 2. From prescription, which pre-supposes a grant. 3. From operation of law; as, where a man grants a piece of ground, he tacitly gives a way to it. *Finch's L.* 63: *Co. Litt.* 56: *Buller's N. P.* 74.

The learned commentator *Blackstone*, (2 *Com.* 35,) observes that, where a man has a right of way over another's land, and the road is out of repair, he who has the right of way may go over any part of the land he pleases; and that

that this is the established rule in public as well as in private ways. But this passage appears to be inaccurate; and Lord *Mansfield*, in the case of *Taylor v. Whitehead*, (*Doug.* 716,) took notice of it. And in that case it was determined, that, if a man has a right of way over another's land, unless the owner of the land is bound by prescription or his own grant to repair the way, he cannot justify going over the adjoining land, when the way is impassable by the overflowing of a river. But, if public highways are founde-
 rous, passengers are justified, from principles of convenience and necessity, in turning out upon the land next the road.

WEIGHTS.

Two important cases on this subject have lately been determined by the Court of King's Bench: one was, that, although there had been a custom in a town to sell butter by 18 ounces to the *pound*, yet the jury of a court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than 16 ounces each, the statutable weight. (13 and 14 Car. II. c. 26.) 3 *T. Rep.* 271. In the other it was determined, that no practice or usage could countervail the *Stat.* 22 Car. II. c. 8, and 22 and 23 Car. II. c. 12, which enact, that, if any person shall either sell or buy grain or salt by any other measure than the Winchester bushel, he shall forfeit 40s. and also the value of the grain or salt so sold or bought; one half to the poor, the other to the informer. 4 *T. Rep.* 750: 5 *T. Rep.* 353.

But, Q. Whether a custom that butter shall be sold in *lumps* of a certain weight may not be supported? 3 *T. Rep.* 271.

Two acts have been lately passed for the prevention of false weights and balances; viz. 35 Geo. III. c. 102, and 37 Geo. III. c. 143. The latter materially alters the former. — By these statutes it is enacted, that the justices at

the petty sessions may appoint one person or more to examine the weights and balances within their district. These inspectors shall be sworn to the faithful discharge of their office; and, as often as the justices shall direct, shall enter into any shop, mill, house, stall, or other premises, of any person who shall sell by retail and weight, to search for and examine his weights and balances; and shall seize those which are not according to the standard in the Exchequer, and bring them before the justices at their petty sessions; and the offender, being there convicted, shall forfeit not less than 5*s.* nor more than 20*s.* at the discretion of the justices, together with costs, to be levied by distress. The false weights and balances are to be broken, and the materials sold. And whoever obstructs the inspectors in the execution of their duty, or shall refuse to produce his weights and balances to them, shall forfeit from 5*s.* to 40*s.*

The inhabitants of any parish, township, or place, may at a vestry-meeting nominate any substantial householder or householders, who, if approved by the justices, shall be inspectors within that parish, township, or place; but such nomination cannot be made till the inhabitants have procured standard-weights, to be paid for out of their poor-rates. The justices at the quarter-sessions shall fix the allowance of the inspectors, to be paid out of the county-rate.

And they shall also order to be purchased, out of the county-rate, standard weights, to be deposited with proper persons and in convenient places, which shall be produced to any person paying a reasonable sum for producing the same.

Prosecutions must commence within one month after the offence.

WIFE.

WIFE. — See *Husband and Wife*.

A bond of a feme covert, jointly with her husband, binds her separate property, *Bro. Ch. Caf.* 16; where Lord Thurlow said, the rule laid down in this case is the proper one, viz. that a feme covert, as to her separate property, is competent to act as a feme-sole; and that Allen and Papworth, 1 *Ves.* 163, and Grigby and Cox, 1 *Ves.* 517, were determined on the same principles. 2 *Ves.* 191, *n.*

An action will not lie against a married woman alone, who is separated from her husband, although she may have a separate maintenance; for, no private contract of separation between husband and wife can be set up against the law of the land, and the solemn contract entered into in the face of heaven. *Marshall v. Rutten*, *Trin.* 40 Geo. III.; and see 2 *Black.* 1079.

WILLS.

Married women, persons insane, infants, persons under duress or undue influence, cannot by will devise their lands.

As to *married women*, it is to be observed, that they cannot make wills unless a power be reserved in a marriage-settlement. 1 *Burr.* 431. But, where personal property is given to a married woman for her sole and separate use, she may dispose of it by will, without the assent of the husband. 3 *Bro.* 8.

With *persons insane*, that is, ideots or lunatics, may be classed persons who are *deaf, dumb, and blind.* *Co. Litt.* 42: 6 *Co.* 25.

If a person of sound mind makes his will, this is not revoked or affected by his subsequent insanity. *Co.* 61.

Infants are incapable of devising; but this incapacity to devise extends only to *real estates*; for, *terms for years, chattel-interests*, and other personal estates, may be devised by *males* at the age of *fourteen years*, and *females* of the age of *twelve*.

twelve. *Godolph. Orph. Leg.* p. 1, c. 8: 2 *Vern.* 104, 469: 2 *Show.* 204: *Comb.* 50: *Prec. Chanc.* 316: *Gilb. Eq. Rep.* 74: *Co. Litt.* 99, b. (6.)

A joint tenant cannot make a will of his joint estate; and, where a joint tenant, during the existence of that estate, made his will, and afterwards severed the joint estate and made partition, it was adjudged, that the will, being void at its creation, did not derive any validity by the subsequent partition. 3 *Burr.* 1488.

It is not a little extraordinary, that there is but one branch of the practice of the law above all others most difficult, and, in certain views of it, most important, which is at the same time the only one intrusted to the care of ignorant persons, and that is the making of wills. This branch of the practice is *difficult*, because it contains niceties and distinctions unknown in their number in any other case, a thousand varieties offering themselves, where there are no settled forms to be a guide; and it is certainly *most important* for preserving peace in families and preventing litigation. A country schoolmaster, or any other *ignoramus*, is by many persons, no doubt equally ignorant, preferred to an intelligent solicitor. The only possible motive is to save a trifling expense; but it is extraordinary that a man's parsimony should engage him in a practice so directly in opposition to all his other feelings; and that he should involve his surviving relations and friends in endless litigation, and expose his estate to ruin, merely for the sake of an inconsiderable saving. Perhaps half of the business of the Court of Chancery is employed in rectifying errors committed in this way.

This statement will, perhaps, expose the author to the censures of the profession, because it may tend to divert men's minds from this practice; it being most certain that, if the profession at large be considered, it is greatly a gainer by it; for, whatever solicitors may lose by not making wills

is amply compensated to them by appeals to our courts of equity, to rectify the errors which others commit. And it is to be lamented that these errors are not confined to schoolmasters alone, and men out of the profession; there are in it, it is true, many men of science and liberality, but there are some also who are not less dangerous by their ignorance than others are by their knavery.

It will be the business of the following observations on this subject to point out to persons of property certain leading circumstances, which may enable them to judge for themselves, whether the person they employ, to perform the office of will-making, performs his duty according to their wishes, and to detect the most obvious and common errors, which he may, through ignorance or inadvertence, commit.

1. And, in order to this, it is necessary to observe, that a person's property is by the law divided into two classes or species; 1, the real estate: 2, his personal. His real estate consists of lands, tenements, and hereditaments; his personal estate consists of leases for years, money in the funds, money lent on mortgage or otherwise, stock in trade, and indeed every kind of property not included in the other species.

2. A will of a freehold estate must, by the *Stat. 29 Car. II. c. 3*, be signed by the testator, or by some other person in his presence, and by his express directions, in the presence of three credible witnesses, who must subscribe their names in the presence of the testator, or the devise will be void, and the estate will descend to the heir at law.

3. Copyhold estates are not within the statute. They are called customary estates, and wills may be made of them without attending to the formalities requisite in the devise of freehold estates. *2 Atk. 37: 2 Bro. C. R. 58*. But there is another point of great importance to be attended to, which is, that copyhold estates in no case pass by deed or will, but by *surrender*. In the case of a devise of a copyhold

copyhold estate, the estate passes by the surrender, and the will only points out the objects to whom it shall pass. Whenever a will is therefore made of copyholds, care must be taken that a surrender of the estate be made into the hands of the lord *to the use of the will*, according to the custom of the manor of which the estate is holden. But equity, in the case of a wife or younger children otherwise unprovided for, will supply the want of a surrender. It is, however, even in these cases, prudent to make such surrender, to save future trouble, expense, and vexation.

4. And observe, that the gift of a man's estate, where he possesses both *freehold* and *copyhold*, may not, in some cases, pass the copyhold estate; it should therefore be given distinctly and separately. 3 *P. Wms*, 323.

5. Wills of personal estates may be made, in point of form, almost any way; so that the intention of the testator may be clearly discovered. But great care should be taken to make the sense so unequivocal, that there may be no doubt about the meaning.

6. For want of explicit and unequivocal language, great mischiefs may arise. Thus, for instance, in a gift of stock in the funds, a person may possess Bank Stock, and 3, 4, or 5, per Cent. Annuities, or all of them; and in his own mind they are all *Bank stock*, or *stock in the Bank*; and, intending to give the whole of his money in the funds to a particular person, he may bequeath to him, by the name of "all his *Bank Stock*," and give the residue of his property to another. Now, in this case, unless there appear upon the face of the will other words, which evidently shew that the testator meant to give the whole of his money in the funds, the legatee will be entitled to the money in that stock only, which is properly denominated *Bank Stock*.

7. So, a person, possessing *South-Sea Stock* and *South-Sea Old and New Annuities*, may, in his own mind, call them all *South-Sea Stock*, and may think to bequeath the whole of those

those several funds to a person ; but, giving them by the name of " all his *South-Sea Stock*," he may give him only a small part of what he intended. It would, therefore, in this case, be highly prudent to discriminate each fund in distinct terms.

8. If it is intended by the testator that A. should have the *use* of the personal estate for life, and that the *property* should go over to B. ; care must be taken not to give the property to A. ; for, in that case, the remainder over will be void. The gift should be to the use of A. for life ; and, after his decease, the property to B.

9. If it is intended to give a freehold estate absolutely to the devisee, it is prudent to give it to him *and his heirs*. For, although the word *heirs* in a *will* is not (as in a *deed*) absolutely necessary to pass an inheritance, yet words must be used which are tantamount in apparent intention ; and here note, as a general law, that the great rule in the construction of wills is the intention of the testator *expressed or clearly implied*. *Fearne*, 291. On this principle, if an estate be given to a man and to his assigns *for ever*, an absolute estate in fee-simple will pass ; but, if it be to *his assigns*, omitting " for ever," an estate for life only passes. So, a devise to a man *for ever* passes the whole estate to him : but, if a freehold estate be given to a man, *without* any other words, he takes but an estate for life.

10. Special care must be taken, in constructing the powers in a will, where an estate is given to trustees to be sold. In this case, the estate must not only be given to the trustees, but it should be given "*to them and their heirs* ;" and the will should direct that the purchaser shall not be accountable for the misapplication or nonapplication of the purchase-money, or any part thereof ; and that the trustees' receipts shall be sufficient discharges. It should also direct them to sell either in the whole or parcels. If the word *heirs* be omitted, the testator's heir must join in the conveyance,
and

and a fine be levied. If the clauses, as to the application of the purchase-money, and the power to give receipts, are omitted, the persons interested in the purchase-money must join in the conveyance; and, if any are under age, their shares invested in the funds till they are of age to execute, attended with a declaration of trust.

11. Sometimes legacies are given to children when they attain the age of twenty-one years; but, in these cases, a nice distinction is to be attended to. If it be intended that the legacy should sink into the residue, in case the child do not attain the age of twenty-one years, it should be given to him *IF he attain twenty-one, or WHEN he shall attain twenty-one*. But, if it be intended as a present entire gift to be enjoyed in future, and that it shall pass to the representatives of the infant, in case of its death under age, it must be given him *TO BE PAID when he attains his age of twenty-one years*. In the former case, the legacy is gone if the child dies before twenty-one; in the latter, it will go over to his next of kin.

12. Care should also be taken to make one general bequest of the residue, after all the particular bequests of money, goods, &c. have taken place; for, in some cases, where the residue is undisposed of, the law gives it to the executor.

13. If a person, about to make his will, be much indebted, which is sometimes the case, and he wishes that his creditors should take an equal chance, he should be careful not to appoint a creditor his executor; for, such a creditor may retain his own debt in preference to all others of equal degree.

14. In a devise of land, if the devisee dies before the testator, and the land is intended to go to the heir at law of the devisee, a new will will be necessary; for, if A. devises lands to B. and his heirs, and B. dies before A. this devise will be void; and the heirs of B. will not take it. And,
in

in this case, a republication of the former will is of no efficacy.

15. If a person, after having made his will, makes any the least legal alteration in his estate, such as suffering a recovery, levying a fine, or making a feoffment, these acts revoke his will. So, also, will a subsequent marriage, or the birth of a child. This is a point necessary to be attended to; for, when any of these events have taken place, it is absolutely necessary that a new will should be made, or that the old will be republished. *See Powell on Devises,*

16. Great care should be taken in the appointing of an executor, on account of the power invested in him by the law. He ought to be a man of the strictest integrity, and of sufficient independance to guard him against temptations to fraud. And, in such a choice, it is necessary we should look farther than to the person so appointed, that is, to the proposed executor of the executor appointed, if it may conveniently be done; for, the executor of A's executor is to all intents and purposes the executor and representative of A. himself. It would, therefore, be prudent that an executor should be a confidential friend, with whom the liberty may be taken of conferring on the subject.

17. In giving legacies to an infant, it will be prudent to express whether it is the testator's intention that it should be paid into his own hands while under age, or into the hands of his father, mother, or other person, for his use; or whether it should be laid out in the public funds: and then again, whether the interest should be applied to his use, and by whom, or whether it shall accumulate for his benefit.

18. So, also, in the case of married women, it will be proper to say, whether it shall be paid into her own hands or not; and, if it is to be so paid, the will should direct that her receipt under her own hand, without her husband, shall be a sufficient discharge to the executor. And, in some cases which may happen, (as from the habits and character

or

or insolvency of her husband,) it may be proper to direct and declare, that the legacy shall not be subject to the *power, control, debts, or engagements*, of the husband: or it may, perhaps, be still better secured to her separate use by bequeathing it to trustees, upon trust, to place it out at interest on government securities, and directing the interest and proceeds as they become due to be paid over to the wife for her separate use; with a declaration, that her receipt alone shall be a sufficient discharge.

19. It is always advisable for the attorney to receive the instructions from the testator's own mouth. And persons, who have great influence with the testator, and are much interested, should withdraw themselves on such occasions.

It may sometimes happen, that a person may be suddenly seized with a dangerous illness, or otherwise reduced to the necessity of making his will, on so sudden an occasion, that it may be impossible to call in proper assistance, or the party may be unable, from extreme weakness, to execute it; in which cases it will be necessary, that the party should make what the law calls a nuncupative will, that is a *verbal* will. These wills were formerly more in use than at present, but were not well received; for, being left to the doubtful fidelity or slippery memory of witnesses, who were liable also to error, and exposed to subornation of perjury, the legislature interposed; and, by the Statute of Frauds and Perjuries, 29 Car. II. c. 3, enacted,

1. That no written will shall be revoked and altered by a subsequent nuncupative one, except it be in the life-time of the testator reduced into writing, and read over to him and approved; and, unless the same be proved to have been so done, by the oaths of three witnesses at the least, who, by the Stat. 4 and 5 Anne, c. 16, must be such as are admissible upon trials at common law.

2. That no nuncupative will shall in any wise be good where the estate bequeathed exceeds £ 30; unless proved by three

three such witnesses, present at the making thereof, or unless they or some of them were specially required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident at least ten days, except he be surprised by sickness on a journey, or from home, and dies without returning to his dwelling.

3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process has been issued to call in the widow, or next of kin, to contest it, if they think proper.

Of the duties payable on probates and letters of administration. — Probates of wills or letters of administration of any estate above £20, and under £100, *ten shillings*.

If the estate is of the value of £100, and under £300, *two pounds ten shillings*.

If of the value of £300, and under £600, *five pounds ten shillings*; and, by 37 Geo. III. c. 90, an additional *two pounds ten shillings*.

If of the value of £600, and under £1000, *eight pounds*; and, by the 37 Geo. III. c. 90, an additional *four pounds*.

If of the value of £1000 and upwards, *fourteen pounds*; and, by 37 Geo. III. c. 90, an additional *six pounds*.

If £2000 and upwards, *twenty pounds*; and, by 37 Geo. III. c. 90, an additional *ten pounds*.

If £5000 and upwards, *thirty pounds*; and, by 37 Geo. III. c. 90, an additional *fifteen pounds*.

If £10000 and upwards, *forty pounds*; and, by 37 Geo. III. c. 90, an additional *twenty pounds*.

And, if any person shall administer any personal estate without proving the will, or taking out letters of admini-

stration, within six months after the death of the party, such person shall forfeit £ 50. 37 Geo. III. c. 90.

Of the stamp-duties on receipts for legacies, and on annuities, given by will. — By 20 Geo. III. c. 28, sect. 1; 23 Geo. III. c. 58, sect. 2; and 29 Geo. III. c. 51, sect. 2; every receipt for a legacy, whether pecuniary or specific, or share of a personal estate, payable to the WIFE, CHILDREN, or GRANDCHILDREN, of the deceased, shall be chargeable as follows:

Where the amount shall not exceed £ 20, *two shillings and sixpence.*

Where the amount thereof shall be of the value of £ 20, and under £ 100, *five shillings.*

Where amount thereof shall be of the value of £ 100 or upwards, *twenty shillings.*

And for every such receipt for a legacy or share of a personal estate;

Where the amount shall not exceed £ 20, *two shillings and sixpence*, by 20 Geo. III. c. 28; and *two shillings and sixpence* by 23 Geo. III. c. 58; total, *five shillings.*

Where the amount thereof shall be of the value of £ 20, and under £ 100, by 20 Geo. III. c. 28, *five shillings*; and, by 23 Geo. III. c. 58, *five shillings*; total, *ten shillings.*

Where the amount thereof shall be £ 100, by 20 Geo. III. c. 28, *one pound*; and 23 Geo. III. c. 58, *one pound*; total, *two pounds.*

And, by 23 Geo. III. c. 58, for every farther sum of £ 100, an additional *one pound* for each £ 100.

And, by 29 Geo. III. c. 51, if of £ 400, an additional *one pound*; and, for every farther sum of £ 100, a farther additional *two pounds.*

Note. — The preceding duties attach only on legacies left by persons dying before the 27th of April, 1796; FROM whence (inclusive) the following duties commence, (by the Stat. 36 Geo. III. c. 90,) EXCEPT as to husband, wife,

wife, children, or grandchildren, and legacies UNDER £20, and shares of personal estates UNDER the value of £100.

And, by the last act, 36 Geo. III. c. 52, (passed the 26th of April, 1796,) upon any legacy, &c. which shall pass to a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, there shall be charged a duty of *two pounds* for every £100 of the value of such legacy or residue; and so after the same rate for any greater or less sum. *Sett. 2.*

To a brother or sister of a father or mother (that is, the uncle or aunt) of the deceased, or any descendant of a brother or sister of a father or mother of the deceased, *three pounds* for every £100 of the value; and after the same rate for any greater or less sum. *Sett. 2.*

To a brother or sister of a grandfather or grandmother (that is, the great uncle or great aunt) of the deceased, or any of their descendants, *four pounds* for every £100 of the value; and after the same rate for any greater or less sum. *Sett. 2.*

To any person in any other degree of collateral consanguinity to the deceased than before described, or any stranger in blood to the deceased, *six pounds* for every £100 of the value; and after the same rate for any greater or less sum. Not to extend to any legacy, &c. which shall be given, or pass, to a husband or wife of the deceased. *Sett. 2.*

The duties are placed under the management of the commissioners of stamps, who are to appoint receivers in the different counties. *Sett. 3, 4.*

The duties are to be paid by executors or administrators on retaining or paying legacies or shares; and, if duty be not paid before legacies or shares are retained by executors or administrators, or discharged, they having deducted it, the amount shall be a debt from them

to his majesty; and, if they pay without deducting the duty, it shall be a debt, not only from them, but also the party receiving the same. *Sec. 6.*

The value of any legacy given by way of annuity for life or lives, or for a term of years, and the duty chargeable thereon, shall be charged according to the tables annexed to the act; and the duty chargeable on such annuity shall be paid by four equal payments, the first before or on completing the payment of the first year's annuity, and the three others in like manner successively, before or on completing the respective payments of the three succeeding years annuity respectively; but, if any such annuity shall determine by death, or any other contingency, before four years payment shall become due, then the duty shall be payable in proportion only to so many payments as actually accrued, and all future payments of the duty shall cease. And the value of any such annuity, if determinable upon any contingency besides the death of any person, shall be calculated without regard to such contingency; and, in such case, not only all future payments shall cease, but such allowances made as are specified in certain tables annexed to the act. *Sec. 8.*

The duty on legacies given to purchase annuities to be calculated on the sums necessary to purchase them, according to the tables annexed to the act. *Sec. 10.*

The duty on legacies, whose value can only be ascertained, from time to time, by application of the allotted fund, to be charged on the money applied, from time to time, as distinct bequests. *Sec. 11.*

The duty, payable on a legacy, &c. given to different persons in succession, shall be paid thereout, as in the case of a legacy, &c. to one person; and, where the same shall go to different persons in succession, some of whom shall be chargeable with no duty, or some with different rates,

so that one rate cannot be immediately charged; all persons, entitled for life, or other temporary interest, shall be chargeable in the same manner as if the annual produce had been given; and the same shall be payable when they become entitled to and begin to receive such produce, and shall be paid by equal portions in four years; and the duty on partial interests shall be charged as the duty on property given, otherwise than to different persons in succession; and persons, who shall become absolutely entitled in succession, shall, when they begin to enjoy the benefit, pay the duty in the same manner as if the same had come immediately on the death of party. *Sec. 12.*

The duty payable on any legacy or residue so given in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person having the burthen of the execution of the will, &c. under which the title thereto shall arise, upon discharge of every or any part of such legacy, &c. to any trustee or other person, to whom the same shall be payable or paid in trust for the persons so entitled thereto in succession; and, if the same shall not be paid to any trustee, then it shall be deducted and paid out of the capital, upon receipt, by any of the persons so entitled in succession of any produce of such capital, or any part thereof, according to the amount of the capital, of which such produce shall be so received: and, where the duty chargeable upon any such bequest shall be chargeable at different rates, so that the same cannot be paid at once, but must be paid in succession as aforesaid, then, and in such case, the person having the execution of the will, &c. in which the bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such person should be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee

as aforesaid; in which case, such trustee shall be chargeable with the duties in the same manner as if he had had the execution of the will, &c. And so, where any partial interest shall be given or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person so enjoying such property, such person shall be chargeable with the duties for such partial interest; and shall retain and pay the same accordingly, in the same manner as if he had had the burthen of the execution of the will, &c. And, in all such cases, the persons so chargeable shall be debtors to the king in like manner, and shall be subject to the like penalties, as the person having the execution of such will, &c. *Sec. 13.*

No duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to, or to be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person not having any power of disposing thereof; but, if the same shall be actually sold or disposed of, or come to any person having power to dispose thereof, then duty shall be paid thereon, as if originally given absolutely. *Sec. 14.*

Duty on legacies in joint tenancy to be paid in proportion to the interest of the parties; and, where a joint tenant shall take the whole by survivorship, &c. he shall pay the whole duty. *Sec. 16.*

Any legacy, or residue, subject to any contingency which may defeat the gift, and whereupon the same may go to some other person, (unless chargeable as an annuity,) shall be charged with duty as an absolute bequest to the person who shall take the same, subject to such contingency, and such duty shall be paid out of the legacy or residue. *Sec. 17.*

Any

Any legacy, &c. subjected to any power of appointment for the benefit of persons specially described, shall be charged with duty as property given to different persons in succession. *Sec. 18.*

Any money or personal estate, directed to be applied in the purchase of real estate, shall pay duty as personal estate, &c. *Sec. 19.*

Estates *pur autre vie*, (for the life of another person,) applicable as personal estate, shall be charged as personal estate. *Sec. 20.*

But, if any direction shall be given by any will for payment of the duty out of some fund, so that the legacy may pass free of duty, no duty shall be chargeable upon the money applied for payment of the duty. *Sec. 21.*

In cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, the executor or administrator, or the person by whom the duty thereon ought to be paid, may set a value thereon, and offer to pay the duty according to such value; or may require the commissioners of stamps to appoint a person to set such value, at their expense; and the commissioners may either accept the duty offered, or appoint a person to appraise such effects, and to set the value, on which the commissioners shall assess the duty; but, if the party shall not be satisfied with the commissioners valuation, they may cause such valuation to be reviewed by the commissioners of land-tax, who may also (if they think fit) appoint a person to appraise the effects, and set a value thereon, whose judgement shall be final. *Sec. 22.*

Where legacies, &c. shall not be satisfied in money, &c. or shall be compounded for, the duty to be paid according to the value of the satisfaction. *Sec. 23.*

If legatees refuse to accept legacies, and give receipts, duty deducted, the court, in case of suit, may order them

to pay costs ; and in suits, where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the court may make order therein. *Sec. 24.*

If a suit be instituted concerning administration, the court to provide for payment of the duty. *Sec. 25.*

Executors and administrators may, at any time, discharge legacies, or pay shares of the personal estate, on payment of the duty accrued. *Sec. 26.*

Legacies, liable to duty, shall not be paid or delivered without a receipt, expressing the date thereof, and the names of the testator or intestate, and of the person to whom such receipt shall be given, and of the party to whom such legacy or residue shall belong, and the amount of the legacy or residue for which such receipt shall be given, and also the amount of the duty payable thereon ; and no receipt shall be available, unless stamped. And no evidence shall be given of any payment without producing such receipt duly stamped, unless the actual payment of the duty shall first be given in evidence. And a copy of the entry, in the books of the commissioners, of payment of the duty, shall be admitted as evidence ; and payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, except the payments which shall complete the payment for each of the first four years during which such annuity shall be payable. *Sec. 27.*

Any executor, administrator, or trustee, who shall pay any legacy or residue without taking such receipt as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit ten pounds *per cent.* on the amount of such receipt ; and all persons, receiving such money or property without giving a written receipt as aforesaid, shall forfeit ten pounds *per cent.* on the money or property received. *Sec. 28.*

Every

Every such receipt shall be brought within twenty-one days after the date to the next stamp-office to be stamped, paying duty for the same; and, upon such payment, an acknowledgement of the payment of the duty so paid, in words at length, and bearing date the day on which such payment shall be made, and subscribed with the officer's name, shall be written upon the receipt, and afterwards the same shall be duly stamped, in the manner directed in the act. *Sec. 29.*

But, if any such receipt shall not be brought to such office within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt to the head office to be stamped in like manner, within three calendar-months after the date thereof, paying the duty, and a farther sum of ten pounds *per cent.* on such duty, by way of penalty; but the commissioners shall not, on any pretence whatever, stamp any receipt unless the duty be paid, and such receipt be brought to be stamped as aforesaid, within the times before limited. *Sec. 29.*

Upon oath or affirmation, administered by a justice or master in Chancery, that less duty has been paid than ought to have been paid, by mistake, the commissioners may rectify such mistake, and accept the difference between the money paid and the just duty, together with ten pounds *per cent.* on such difference, by way of penalty. *Sec. 30.*

Persons, paying or receiving money contrary to this act, indemnified on discovering the other offender within twelve months. *Sec. 31.*

If, by infancy or absence, legacies cannot be paid, the money may be paid into the Bank, and laid out in the 3 *per Cents*; and, if such money be improperly paid in, the Chancery may dispose thereof. *Sec. 32.*

[And, when money is paid into the Bank in pursuance hereof, the accountant-general's certificate shall be filed in
in

in the Report-Office, where his drafts on the Bank for the money for investment shall be entered, and be a warrant to the Bank for the payment. 37 Geo. III. c. 135.]

If more than the proper duty has been paid, the commissioners for stamps may return the excess; and, if less, on payment of the full duty, the Chancery may order re-payment to the party. *Sec. 32.*

If it shall appear to the commissioners for stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for. But the duty shall be paid on any part of personal estates not included in the composition. *Sec. 33.*

If, at any time, after payment of duty on any legacy or residue, any debt should be recovered against the estate, by reason whereof any legatee or entitled person shall be obliged to refund, the commissioners are, on proof thereof on oath as aforesaid, to repay the duty. *Sec. 34.*

Executors, previous to retaining their own legacies, to transmit the particulars, with the duty offered, to the commissioners of stamps, who shall charge the same agreeably to this act; and, in case any person shall neglect to pay such duty within fourteen days, such person shall forfeit treble the value of the duty which ought to have been paid. *Sec. 35.*

If administration be made void, and any duty shall have been improperly paid, it shall be repaid: but, if it ought to have been paid, it shall be allowed in account with the rightful executor. *Sec. 37.*

Persons, swearing falsely, are guilty of perjury. *Sec. 38.* Penalty of £500 for altering receipts. *Sec. 39.* And persons, forging stamps, &c. to suffer death. *Sec. 40.*

The penalties are recoverable in the court of Exchequer; but, if it appears, to the satisfaction of the attorney-general, that

that the penalty was incurred without any intention of fraud, he may stop proceedings. *Sett.* 43.

The form of an account and receipt, which may be taken by the executor, &c. is also annexed to the act, as follows :

On account of the personal estate of *A. B.* deceased, between *C. D.* taking the administration of the said estate, and *E. F.* legatees [*or next of kin, as the case may be*].

	£.	s.	d.
Amount of the sum [<i>or value, if not in money</i>]			
accounted for - - - - -			
Duty allowed at the rate of			per cent. -

Balance received - - -	£		_____

RECEIVED, the day of the above
balance in [*full, or part, as the case may be*] of my [*legacy,*
or share, as the case may be] out of the personal estate
above-mentioned.

Signed

WORDS.

The intent of the parties to a contract or agreement is to be gathered from external signs and actions; those signs are *words*. And the rule of law seems to be, that, unless there be the most decisive reasons which lead to a conjecture that the intention was otherwise, they are to be understood in their proper and most known signification. Not according to the etymology and origin of them, but that which is vulgar and most in use; for, use is the judge, the law, and the rule, of speech. 1 *Pow. Cont.* 372: *Plowd.* 169.

In some cases, the ordinary import of words may be restrained; first, where there is an original defect in the
will

will of the speaker, so that it is not co-extensive with his words. And, secondly, where there is some collateral accident inconsistent with the speaker's design.

Under the first of these distinctions we may comprise all cases where there is good reason to conclude, that the person who spoke was aware of certain things, and yet did not intend to include them in the general terms he used; though he did not expressly except them, because he supposed such an exception clear in itself. Thus, if a man have goods of his testator, and also other goods in his own right, and grant "all his goods," the goods that he has as executor do not pass. 3 *Mod.* 278. So, if a condition of a bond be, that A. shall not hurt, endanger, or molest, B. in his lands or goods upon any account, it shall be intended of a wrongful molestation. *Cro. Eliz.* 705. The principle, in the second instance, is, that the matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense; and, therefore, the generality of the words used shall be restrained by the particular occasion. Thus, where A. had a judgement of £6000 against B. — B. gave A. a legacy of £5, and died: A. on receipt of this £5, gave the executor of B. a release in this manner: "I acknowledge to have received of C. £5, left me as a legacy by B. and do release him *all demands* which I against him, as executor of B. can have for any matter whatsoever:" — it was adjudged, that the generality of the words *all demands* should be restrained by the particular occasion mentioned in the former part thereof; viz. the receipt of the £5 legacy; and should not be a discharge of the judgement. 1 *Eq. Cas. Abr.* 170, pl. 4, note a.: 1 *Lev.* 101.

But, if there be in the terms of a contract any obscurity or dubiouness, which cannot be cleared up by the intention of the contracting parties or any other circumstance, and all other rules of exposition of words fail, then the construction

struction ought to be against him who ought to have explained himself. Therefore, if two tenants in common grant a rent of 10s. this is several, and the grantees shall have 20s.; but, if they make a lease and reserve 10s. they shall have only 10s. between them. 5 Co. 7, b.: *Plowd.* 140, 161, 171, 289: *Co. Litt.* 197, a. 267, b. See farther on this subject, 2 *Black. Com.* c. 23.

THE END.



I N D E X

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